THE SCIENCE FICTION OF CORPORATE CRIMINAL LIABILITY: CONTAINING THE MACHINE THROUGH THE CORPORATE DEATH PENALTY

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Modern society had "created a class of artificial beings who bid fair soon to be the masters of their creator"; they were "establishing despotisms which no spasmodic popular effort will be able to shake off. Everywhere . . . they illustrate the truth of the old maxim of the common law, that corporations have no souls."[1]

INTRODUCTION

In the movie *The Terminator*,[2] a computerized robot travels through time, from the future to the present, to assassinate the woman who would later birth the son destined to lead the human revolution in the late twenty-first century against the ruling computers. Arnold Schwarzenegger played "the Terminator" robot that takes on a human form to disguise his robotic nature from humans. The underlying premise of the story is that humans created computers and improved them over time—until computers acquired sufficient power to become masters over their creators. As soulless, analytic beings, the computers concluded that humans threatened their existence; hence, humans had to be enslaved and, ultimately, eliminated.

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1. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 513 (2d ed. 1985) (quoting HIGH FINANCE IN THE SIXTIES 114–16 (Frederick C. Hick ed., 1929)).

2. THE TERMINATOR (Orion Pictures Corp. 1984).

Although science fiction, *The Terminator* could conceivably be renamed The Corporation, and with minor changes, such as recasting the corporate lobbyist[3] in Schwarzenegger's role, the current state of corporate dominance could slip right into the plot of the original movie.[4]

Corporations have evolved from simple entities with narrow purposes[5] into complex enterprises owned by thousands of shareholders, managed by hired hands, and unlimited in purpose.[6] Corporations proliferated as limited liability allowed passive investors with no operational control over the corporation to avoid the risk of liability incurred by the corporation.[7] The collective contributions of investors in corporations often provide for market opportunities that are not otherwise available, making the corporation "an awesome social invention."[8] As industrialization and now globalization have driven corporations toward consolidation of power and market expansion, those individuals working to enhance the success of the entity and receive benefits from the entity use their best efforts and talents to advance the interests of the corporation, that is, to maximize

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3. *See infra* Part II and notes 180–82, 185 (discussing the corporate use of lobbyists).

4. This is not to say that corporations actively seek to terminate humans. Nevertheless, corporations routinely make decisions based upon profit-motive that are detrimental to human existence. MARJORIE KELLY, THE DIVINE RIGHT OF CAPITAL 26–27 (2001) (explaining that because the corporate focus is on impact to the corporate financial statements, environmental damage is an invisible cost because the cost is usually borne by the community in the form of damage to water quality, air quality, and/or food supplies rather than the corporation, and therefore is a cost that does not appear on the corporate balance sheet).

5. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW 2, 20–22, 32–34 (2000) (identifying mid-nineteenth century English joint-stock companies as the antecedent of the American corporation); *see also* 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY §§ 2:02, :04 (2d ed. 1992) (reviewing the evolution of the corporate form and the development of corporate criminal liability); DAVID O. FRIEDRICHS, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 57–58 (2d ed. 2004) (describing the historical development of the corporation and corporate crime); ARTHUR K. KUHN, A COMPARATIVE STUDY OF THE LAW OF CORPORATIONS (1912) (describing the historical origins of corporations and comparing Roman, Greek, Continental European, English, and American corporate development). *See generally* George Ellard, Note, *Constitutional Rights of The Corporate Person*, 91 YALE L.J. 1641 (1982) (briefly reviewing the history of the corporation).

6. *See* GEVURTZ, *supra* note 5, at 21–22, 26.

7. *See id.* at 27–28 (reviewing the historical evolution of corporate limited liability). *See generally* Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573 (1986) (describing the historical development of corporate limited liability).

8. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), *reprinted in* MICHAEL C. JENSEN, A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS AND ORGANIZATIONAL FORMS 85, 134 (2000). Jensen and Meckling suggest that the willingness of millions of investors to turn over their money to managers with a divergence of interests is empirical evidence that the corporate structure has proven its success. *Id.* at 35.

shareholder profit. Consequently, corporate decisions are driven by cost-benefit analysis[9] rather than social responsibility.[10]

Corporations enjoy status as legal entities just as humans do; unlike humans, however, corporations are soulless.[11] Corporations commit crimes just as humans do; unlike humans, corporations cannot be damned.[12] Inherent in legal

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9. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profit*, N.Y. TIMES, Sept. 13, 1970, (Magazine), at 32. Guided by the mantra to "maximize utility" as encouraged by economist Friedman, businesspersons engage in "the rational pursuit of self-interest in free markets" without any consideration of "the social responsibility of business." *Id.*; *see also* STEPHEN M. ROSOFF ET AL., PROFIT WITHOUT HONOR: WHITE-COLLAR CRIME AND THE LOOTING OF AMERICA 400 (1998) (citing 1 ADAM SMITH, THE WEALTH OF NATIONS 56–57 (P.F. Collier 1902) (1776)):

> It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

10. Rosoff identifies a survey of graduate business students revealing that such students are "willing to do whatever [is] necessary to further their own interests, with little or no regard for fundamental moral principles." *See* ROSOFF ET AL., *supra* note 9, at 401 (citing John Wood, Joseph M. Lonenecker & Carlos Moore, *Ethical Attitudes of Students and Business Professionals: A Study of Moral Reasoning*, 7 J. BUS. ETHICS 249–57 (1988); Janet Walker, *'Greed is Good' . . . or Is It? Economic Ideology and Moral Tension in a Graduate School of Business*, 11 J. BUS. ETHICS 273–83 (1992)). The idea that corporations should act socially responsibly to the detriment of profits has been criticized. *See* Friedman, *supra* note 9; Clive Crook, *The Good Company: A Survey of Corporate Social Responsibility*, THE ECONOMIST, Jan. 22, 2005, (Survey Section), at 1, 15 (asserting that competition based upon profit-motive improves social welfare). Historically, corporations were expected to serve the public good. *See* JOEL BAKAN, THE CORPORATION 153–54 (2004) (observing that in seventeenth-century England, and in the eighteenth- and nineteenth-century United States, corporations were formed "to serve national interests and advance the public good," and suggesting that, as a creation of the state, corporations as institutions supporting public goals can be restored).

11. Commentators have long recognized the difficulty in punishing the "artificial person" of the corporation, which has "'no soul to be damned, and no body to be kicked.'" John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) [hereinafter Coffee, *No Soul to Damn*] (quoting Edward, First Baron Thurlow, who reportedly remarked: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?"); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1562–63 (1990) (describing the use of corporate civil tort liability principles of vicarious liability and respondeat superior in the corporate criminal liability context).

12. In an earlier study of illegal corporate behavior, Marshall Clinard concluded that "approximately two-thirds of large corporations violated the law." MARSHALL B. CLINARD, ILLEGAL CORPORATE BEHAVIOR 214 (1979) [hereinafter CLINARD, ILLEGAL CORPORATE BEHAVIOR]. Scholars have long struggled to limit corporate crimes. *See, e.g.*, Coffee, *No Soul to Damn*, *supra* note 11, at 413–24 (proposing that any criminal fine imposed upon a corporation be paid in equity securities issued to the state's crime victim fund, rather than cash); John C. Coffee et al., *Standards for Organizational Probation: A Proposal to the United States Sentencing Commission*, 10 WHITTIER L. REV. 77, 82 (1988)

theories defining the corporation as a juristic person[13] is the fundamental recognition that its existence as a juristic person is created by the State.[14] As such,

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(positing that probation for organizational offenders will ensure judicial oversight of organizational compliance); Jeffery S. Parker, *Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties*, 26 AM. CRIM. L. REV. 513, 553–54, 570, 576–78 (1989) [hereinafter Parker, *Optimal Penalties*] (advocating monetary penalties that include quantifiable social loss in organizational criminal fines as optimal penalties that provide both deterrence and punishment, over organizational probation that requires direct intervention into business activities); Jeffrey S. Parker, *Rules Without . . . : Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 WASH. U. L.Q. 397, 405 (1993) [hereinafter Parker, *Rules Without*] (criticizing sentencing guidelines as an "arbitrary expression[ ] of a set of preferences held by the Commissioners"); Victoria Toensing, *Corporations on Probation: Sentenced to Fail*, LEGAL TIMES, Feb. 12, 1990, at 21; *see also* Michael K. Block & Joseph G. Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131, 1132, 1138 (1980) (recognizing that the extreme measure of hanging a price-fixer occasionally would minimize the cost of enforcement and enhance deterrence in the context of considering the deterrent effect of low antitrust enforcement levels with large fines); Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988–1990*, 71 B.U. L. REV. 247, 264–69 (1991) (reviewing the "empirical evidence on the totality of sanctions for corporate misconduct" in addition to "monetary sanctions imposed directly by the sentencing judge against the corporation"). In addition to the types of sanctions available, the question of whom to punish—the corporation or the individuals acting on behalf of the corporation—raises additional issues. Certainly, where the particular actions of an individual can be identified as the source of injury, that individual can be punished. However, oftentimes, it is the collective actions or inactions of many individuals that leads to the injury.

> A human being who would not harm you on an individual face-to-face basis, who is charitable, civic-minded, loving, and devout, will wound or kill you from behind the corporate veil. He may do this without qualm because he has been conditioned to drop a curtain between his private moral and religious self and his corporate immoral and irreligious self. Society at large accepts and, if only by its silence, *validates* such compartmentalization.

Morton Mintz, *At Any Cost: Corporate Greed, Women, and the Dalkon Shield*, *in* CORPORATE VIOLENCE: INJURY AND DEATH FOR PROFIT 30, 31 (Stuart L. Hills ed., 1987) (emphasis in original).

13. American courts have employed three legal theories in their historical views of the corporation as a juristic person: (1) fiction theory; (2) contract theory; and (3) legal realism. *See* Ellard, *supra* note 5, at 1642–45. Under the fiction theory, the corporation is a person only because the State defines the corporation as a person, and thus the corporation is limited to only those acts that the State permits. *Id.* at 1645–46. The contract theory defines the corporation as a "product of contractual agreement," defined through the sum of the shareholders' rights and duties; the theory thereby limits sovereign authority over the corporation to the same degree that sovereign authority may be exercised regarding any existing contractual agreement. *Id.* at 1647–49. Legal realism extends beyond the earlier formed theories to recognize that the corporation, although not a "natural" person as the term might be used to refer to a human person, faces competing interests and demands that extend beyond those defined by the state or by the contractual documents connected to the corporation. *Id.* at 1649–50.

the State can extend or limit the rights of the corporation through statutes and judicial interpretation. The United States has struggled with imposing meaningful punishment on corporate recidivists just as it has with human recidivists. Although increased penalties may be imposed that take into consideration prior misconduct, for the nonhuman corporation, there is no personal moral sanction. Nonetheless, as a juristic person, the State can impose the same responsibilities on the corporate "person" as it does on the human person.[15] It can refuse to accept corporate conduct that it does not accept from individuals.[16] In other words, the State can create a legal reality that consistently reflects society's values. And just as the State might imprison an individual under a three-strikes penalty regime, it may need to "kill" a few corporations in order to deter the rest.[17]

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14. Even if one follows the legal realism approach, fundamentally the State creates *all* legal entities. *See* ALEXANDER NEKAM, THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY 35–36 (1938).

15. *See infra* note 17; *see also* Ellard, *supra* note 5, at 1648–51 & nn.30–42.

16. For example, the State can refuse to permit an automaker to rely upon the assessment that it is cheaper to settle the civil lawsuits of families whose loved ones were torturously killed in infernos from minor rear-end collisions, just as society would never permit a human to act on that assessment. ROSOFF ET AL., *supra* note 9, at 59–60. Rosoff recounts the decision by Ford Motor Company to go forward with the production and marketing of the Pinto automobile despite test results indicating that, due to the positioning of the gas tank near the rear underside of the vehicle, minor rear-end collisions could result (and did result) in fiery explosions. *Id.* Discovery in the civil lawsuits brought by victims and their families revealed that Ford estimated that the total cost ($137 million) to repair each auto ($11 per vehicle) was greater than the likely cost in litigation and damages to victims (based upon an estimate of 180 burn deaths, 180 serious burn injuries, and 21,000 burned vehicles for a total cost of only $49.5 million). *Id.* Ford's estimates proved faulty, however, because judgments against Ford are routinely awarded, including one civil lawsuit where a California jury awarded $125 million in punitive damages. *Id.* The state can hold accountable the corporations that bribe, extort, falsify records, cheat on taxes, or disregard criminal laws every day, just as it demands accountability from individuals who shoplift Disney movies, steal golf clubs, or commit other property crimes. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003) (5-4 decision) (upholding as constitutional a sentence of twenty-five years to life imprisonment under California's "three strikes and you're out" law, where defendant was given a third-strike sentence of twenty-five years to life for each of two video shoplifting convictions (with a total value of $153.54), making him ineligible for parole for fifty years); *see also* Ewing v. California, 538 U.S. 11 (2003) (companion case to Andrade; Ewing earned a sentence of twenty-five years to life in California where his third strike involved theft of three golf clubs worth $399 each); Bob Egelko, *Top Court Upholds "3 Strikes,"* S.F. CHRON., Mar. 6, 2003, at A1 (relating that none of Andrade's convictions were for violent crimes; instead, three of his prior convictions were for residential burglaries).

17. Despite the tragic consequences of some corporate decisions, this Article does *not* propose to kill any humans under the proposed corporate death penalty act. *But see* Karyn Strickler, *Is it Time for a Corporate Death Penalty Act?* (Jan. 28, 2005), http://www.commondreams.org/views05/0128-22.htm. Applying the death penalty to humans for any crime is well beyond the scope of this Article.

For corporations,[18] "punishment" is theoretical since punishing the inanimate corporation can be likened to punishing the robot in *The Terminator*. A corporation cannot be imprisoned. Lacking human emotion, a corporation cannot be shamed,[19] but market confidence can diminish temporarily,[20] price per share can fall[21] due to concerns about potential liability for criminal or tortious acts, and officers and directors can be subjected to the full panoply of criminal sanctions when personal misconduct is proven beyond a reasonable doubt.[22] A corporation acts only through its human agents.[23] One way to address corporate misconduct

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18. As discussed *infra*, the proposed corporate death penalty could be applied to other nonhuman entities in addition to corporations. "Corporation" is used throughout this Article for convenience, but much of the analysis can be extended to other business and organizational entities.

19. *See* Dan M. Kahan, *Shaming White-Collar Offenders*, 12 FED. SENT. REP. 51, 53 (1999) (suggesting that the Guidelines provisions in Chapter 8 ("Organizational Sentencing Guidelines") permitting a court to require an organization to publicize the nature of its offense and conviction at its expense are a method of shaming that should be extended to individual white-collar offenders as an alternative to imprisonment). *But see* Jeffrey Abramson, *Response to Professor Kahan*, 12 FED. SENT. REP. 56, 57 (1999) (suggesting that even when used as against a corporate offender, shaming can seem to be "weak and watery" and "more public relations than punishment").

20. *See* Jeffrey S. Parker & Raymond A. Atkins, *Did the Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations*, 42 J.L. & ECON. 423, 427 (1999) (acknowledging that the collateral consequences of conviction can affect a corporation's assets and reputation).

21. *See* Melissa S. Baucus & David A. Baucus, *Paying the Piper: An Empirical Examination of Longer-Term Financial Consequences of Illegal Corporate Behavior*, 40 ACAD. MGMT. J. 129, 131 (1997) (citing studies confirming the negative short-term market reaction to reports of prosecution or penalties for wrongdoing).

22. *See infra* notes 25, 101, 126 (discussing the individual indictments of officers at Tyco, WorldCom Inc., Enron Corporation, and Adelphia).

23. *See* 1 BRICKEY, CORPORATE CRIMINAL LIABILITY, *supra* note 5, §§ 3:01–:11. Professor Brickey specifically addresses the various theories upon which corporate criminal liability may be imputed through the acts of agents. For a critical view of this approach, see Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 430–32 (1963) (recognizing the "conventional requirement" that, in order to hold an individual criminally responsible for the acts of another, "[the individual] must have participated in the acts of the other in some meaningful way, as by directing or encouraging them, aiding in their commission or permitting them to be done by subordinates whom [the individual] has power to control" (citations omitted)); Ruth Ann Weidel et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100, 1103–05, 1123 (1990) (concluding that the reduction of the mens rea requirement in the responsible corporate officer doctrine analysis will also lead to a reduction of the required mens rea in environmental criminal cases involving corporate officers). *See also* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 177–78 (2001) (discussing the application of the responsible corporate officer doctrine to environmental crimes, and Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301–399 (2000), criminal prosecutions). *But see* Gerhard O. Mueller, *Mens Rea and the Corporation—A Study of the Model Penal Code Position on Corporate Criminal Liability*, 19 U. PITT. L. REV. 21, 41–46 (1957) (questioning whether corporations should be held criminally liable for the acts of menial employees).

has been to remove the errant officers and directors for their criminal conduct and replace them with new officers and directors,[24] who may be apologetic[25] for the corporation but nevertheless lack personal responsibility for its prior bad acts.[26] For the "worst" offenders, defined by the United States Sentencing Guidelines[27] as "criminal purpose organizations," the Guidelines provide for fines that divest the

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See also John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 339–40 (2004) (describing the political struggle in America over the role of corporations). Professor Baker suggests that states began to use criminal penalties to exercise control over corporations as the corporations "became more powerful than the states that chartered them." *Id.* at 340.

24. *See infra* Part III.B.5.

25. *See, e.g.*, Mark Maremont, *Leading the News: Tyco Posts Profit: Restates Results Going Back to '98*, WALL ST. J., Jul. 30, 2003, at A3 (reporting that new Tyco Chief Executive Officer ("CEO") Edward Breen defended the earnings restatements by explaining that cleaning up accounting mistakes was going relatively quickly, given the complexity of the corporation). Breen was appointed in July 2002 to replace former CEO Dennis Kozlowski, who was first indicted in June 2002 for sales tax evasion and obstruction of justice, but later faced additional charges of unauthorized compensation and improper stock trading. Mark Maremont, *Tyco Cuts Forecasts, Sets Charge on TyCom at up to $2.5 Billion*, WALL ST. J., Sept. 26, 2002, at A6; Mark Maremont & Laurie P. Cohen, *Leading the News: Former Tyco CEO is Charged with Two New Felony Counts*, WALL ST. J., June 27, 2002, at A3.

26. In much the same way, new generations of Americans feel sympathy but not responsibility for the demise of Native Americans during our country's early history, or for the immorality of enslaving Africans. Likewise, new generations of Germans feel distanced from the atrocities imposed by Hitler's reign of terror and destruction in Europe in the 1930s and 1940s. For example, in a shift from a prior viewpoint, the inclusion of the German people in the diplomatic events scheduled for the sixtieth anniversary of the D-Day invasion during World War II portrayed the German people as "victims" of the Nazi regime who also suffered from its repressive policies and politics. *See* John Vinocur, *For the Germans, the War's Ambiguities Linger, Politicus D-Day/60 Years Later*, INT'L HERALD TRIB., June 7, 2004, at 1; John Vinocur, *Just Whose Liberation was Begun on June 6?; Politicus*, INT'L HERALD TRIB., June 1, 2004, at 2.

27. The Supreme Court recently decided a landmark case construing the Guidelines, holding that they are subject to the Sixth Amendment right to jury trial, and facts that lead to enhanced sentences (other than facts relating to a defendant's criminal history) must be determined by juries beyond a reasonable doubt. United States v. Booker, 125 S. Ct. 738 (2005) (Stevens, J., writing the majority opinion in part). The Court further concluded that "in light of this holding, two provisions of the Sentencing Reform Act of 1984 [18 U.S.C. §§ 3553(b)(1), 3742(e) (2000)] that have the effect of making the Guidelines mandatory must be invalidated . . . ." *Id.* at 746. The Court recognized its holding "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, *see* 18 U.S.C.A. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, *see* § 3553(a) (Supp. 2004)." *Booker*, 125 S. Ct. at 757 (Breyer, J., writing the majority opinion in part). Because the ruling requires federal courts to consider the Guidelines recommendations in sentencing, the effect of the decision on the analysis in this Article and its references to the Guidelines is minimal. Mandatory language within the Guidelines, however, should be read in light of the *Booker* decision. *Id.*

corporation of all its net assets.[28] This will certainly harm shareholders. Despite its criminal past, unless a corporation is terminated or its management is divorced from the underlying economic assets derived from its criminal "acts," it will continue as an entity making economically based, profit-enhancing decisions as to how to proceed in the future.[29]

Repeated and serious corporate criminality may indicate that top management is failing to model and communicate an ethical corporate culture.[30]

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28. U.S. SENTENCING GUIDELINES MANUAL § 8C1.1 (2004) [hereinafter U.S.S.G.] provides the following explanation of a criminal purpose organization:

> If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.

This Article seeks to rationalize and enhance the applicability of this provision.

29. Although the corporation may bear some "shame" for its misconduct, a strong marketing team can be employed to overcome the negative publicity. *See, e.g.*, James Risen, *Iacocca Steps in to Close Chrysler Credibility Gap*, L.A. TIMES, Jul. 13, 1987 (Business), at 1 (noting that Chrysler CEO Lee Iacocca led a public relations campaign to counter the harm to Chrysler's reputation after it pled guilty to odometer tampering on 60,000 new cars and selling repaired automobiles as new. Public opinion polls revealed a positive reaction by the public to the mea culpa, and Chrysler reported no drop in automobile sales despite initial widespread negative public response to the corporate wrongdoing). Tyco also reacted quickly to unfavorable criminal images. *Cf.* Rachel Beck, *Corporate Excesses Live on Tyco Videotape*, TOPEKA CAPITAL-JOURNAL, Nov. 2, 2003, at 5B (describing videotape of a "lavish" birthday party given by "former CEO L. Dennis Kozlowski for his wife in 2001," which was played at Kozlowski's first jury trial in which he was accused of looting Tyco International Ltd. at the expense of shareholders. Kozlowski and former Chief Financial Officer ("CFO") Mark Swartz "were charged with stealing $170 million from the company and obtaining $430 million through fraudulent sales of securities"); USA TODAY, Dec. 4, 2003, at 3B (full page advertisement entitled "This is What the 260,000 Employees of Tyco did Yesterday. Imagine What They'll do Tomorrow") (on file with author). Not only does the ad manage to include the large number of employees in bold capitals letters, it goes on in detail to describe the company's role in our lives by producing "critical medical equipment" that "make people feel better," "monitor[ing] the safety of 6 million homes[, s]o people could sleep soundly," building sprinkler heads and breathing apparatuses for firefighters to "keep people safe from fire," producing plastic hangers and antitheft devices for retail "to keep the economy moving," providing sign supports, switches, and connectors to "ma[k]e travel possible," and providing relief for headaches as "the largest producer of acetaminophen." *Id.* The ad subtly suggests that Tyco's recent problems were caused by a few and not by its many hardworking, creative employees by concluding that the "260,000 employees of Tyco are looking forward to creating new solutions, introducing new products, and meeting the needs of their customers today and tomorrow. Just like they did yesterday." *Id.*

30. *See* William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647 (1994). Professor Laufer has identified four models of corporate criminal liability that have garnered scholarly attention: (1) proactive fault; (2) reactive fault; (3) corporate ethos; and (4) corporate policy. *Id.* at 664–68. This Article focuses on the third and fourth models, recognizing that corporate ethics must be demonstrated through corporate leadership, and that corporate policy must communicate, support, and reward lawful conduct.

The United States Sentencing Commission ("Sentencing Commission") created federal sentencing guidelines for organizations that encourage corporations to implement compliance management programs that assure lawful conduct[31] and reward sincere efforts by lessening fines for those corporations that face criminal liability.[32] Given the corporate violations that have occurred since implementing the Organizational Sentencing Guidelines, compliance programs and financial punishment may not adequately deter.[33] Legal innovations to "rein in" the corporations have become impotent to stop corporate misconduct, much as the heroine in *Terminator 2: Judgment Day*, having survived an attempted assassination by the Terminator, finds herself fighting against a new human-like robot that has the ability to change form, defy physics, and command inconceivable strength.[34]

For humans, a recent development in criminal law has been the "three strikes and you're out" laws. Depending upon the jurisdiction, these laws generally provide that if a person commits three crimes,[35] the prosecution can elect to charge the individual under the three-strikes law, and if convicted, that person's sentence may be enhanced up to life imprisonment.[36] Underlying the three-strikes laws' twin purposes of incapacitation and deterrence[37] is the public's frustration with recidivism.[38]

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31. *See infra* notes 118–20 and accompanying text.

32. *See infra* notes 122, 123 and accompanying text.

33. The Organizational Sentencing Guidelines can be found in U.S.S.G. ch. 8. *See infra* notes 54–62 (regarding the variety of punishments available under the Organizational Sentencing Guidelines, including fines, restitution, disgorgement, community service, remedial orders, and probation).

34. TERMINATOR 2: JUDGMENT DAY (Orion Pictures Corp. 1991). Justice Brandeis compared the concentration of wealth in corporations to Frankenstein's monster, created by state corporate laws. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 567 (1933) (Brandeis, J., dissenting in part).

35. Indeed, in California, the third strike can be a misdemeanor, elevated to a felony by virtue of previous convictions, and then elevated again to three strikes because it now is a felony. *See supra* note 16 (discussing the application of California's three-strikes law and the enhancement of misdemeanors to felony crimes). *See, e.g.*, ARK. CODE ANN. § 5-4-501 (2003) (habitual offenders—sentencing for felony); CAL. PENAL CODE § 667 (West 2005) (habitual criminals; enhancement of sentence); COLO. REV. STAT. § 18-1.3-801 (West 2004) (punishment for habitual criminals); CONN. GEN. STAT. § 53a-40 (2001) (persistent offenders: definitions; defense; authorized sentences); FLA. STAT. ch. 775.084 (West 2005) (violent career criminals; habitual felony offenders and habitual violent felony offenders; three-time violent felony offenders; definitions; procedure; enhanced penalties or mandatory minimum prison terms); 720 ILL. COMP. STAT. 5/33B-1 (West 2005) (habitual criminals; determination); N.Y. PENAL LAW § 70.10 (McKinney 2004) (sentence of imprisonment for persistent felony offender).

36. *See supra* text accompanying note 35.

37. *See, e.g.*, Ewing v. California, 538 U.S. 11, 14 (2003) (identifying California's three-strikes law as reflecting "a shift in the State's sentencing policies toward incapacitating and deterring repeat offenders who threaten the public safety").

38. *See, e.g.*, *id.* at 26 (recognizing that "[r]ecidivism is a serious public safety concern in California and throughout the Nation," thereby justifying California's three-strikes law).

Imposing a three-strikes standard on corporations would likewise address the public's frustration with recidivism and serve purposes of incapacitation and deterrence. This Article posits that repeated misconduct on the part of the corporation should not be tolerated, and that designated conduct should earn "strikes" that serve as a probationary period during which the corporation must rectify its misconduct and redirect its focus, or face either the ouster of its top management and board or death through dissolution. At the same time, this Article proposes a regime that minimizes harm to innocent shareholders and employees associated with errant corporations by focusing punishment in a manner that divorces errant management from the underlying corporate assets.

This Article poses the question of whether corporations can be reined in by an optimized regime of punishment that includes termination of corporate existence in a systematic and rationalized manner. The question is considered in three parts. Part I assesses the current criminal[39] and civil punishment[40] of corporations. Present efforts to manage and direct corporate conduct are considered, including civil, administrative, and regulatory oversight,[41] the Sarbanes-Oxley Act of 2002 legislation,[42] and the Good Corporate Citizen[43] approach of the Organizational Sentencing Guidelines to rein in corporate criminal conduct. Part II considers the underlying reasons why the current legal landscape fails to contain corporate misconduct that leads to such devastating results.[44] This part establishes a key premise of the Article: the present approach to corporate criminality is systemically impotent. Part III proposes the use of a three-strikes corporate death penalty that rationalizes and extends what is presently available in criminal law.[45] In addition to proposing such a solution, the Article considers the primary difficulties in imposing such punishment.[46] This Article is founded on the proposition that the long-term coexistence of corporations and humans is dependent upon encouraging the good corporate citizen; the proposal for a corporate death penalty urges the soulless corporation to behave for its own good,[47] even if it cannot comprehend the need to behave for the good of society.

I. PRESENT EFFORTS TO ADDRESS CORPORATE MISCONDUCT

A. Criminal Liability

Those corporations that elect to adhere to regulations and statutory prohibitions are arguably at a competitive disadvantage relative to those businesses that do not follow the law but, instead, gamble on the likelihood that they either

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39. *See infra* Part I.A.
40. *See infra* Part I.B.
41. *See infra* Part I.C.
42. *See infra* Part I.D.
43. *See infra* Part I.D.
44. *See infra* Part II.
45. *See infra* Part III.A–B.
46. *See infra* Part III.C.
47. In other words, the corporate death penalty addresses the corporate actor's self-interest, much like Adam Smith's butcher, brewer, and baker. *See* ROSOFF ET AL., *supra* note 9 (citing 1 SMITH, *supra* note 9).

will not be caught or will not be severely punished if caught.[48] The conviction of corporations for the acts of their officers, directors, employees, and agents now seems routine.[49] Because of the nature of the corporation, sanctions imposed for criminal liability are not substantially distinct from the sanctions imposed for civil liability;[50] thus, imposing criminal liability only further enhances the burden of proof on the part of the government.[51]

There are plenty of criminal laws that punish the criminal conduct of most corporate entities.[52] The Organizational Sentencing Guidelines provide for various forms of punishment that can be used in combination within the sentencing court's discretion.[53] Punishment for organizations under the Guidelines includes fines,[54]

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48. *See* MARSHALL B. CLINARD, CORPORATE CORRUPTION 166–71 (1990) (identifying the need for stronger enforcement and stiffer penalties to combat corporate crime); *see also, e.g.*, Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Criminal Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2452–53 (1995) (reviewing the historical development of environmental criminal regulation, including the failed efforts of the government to deter violations due to nonintegration of environmental and criminal laws).

49. *See* 1 BRICKEY, CORPORATE CRIMINAL LIABILITY, *supra* note 5; Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 BUS. LAWYER 617, 618 (1994) (reviewing general principles of corporate criminal liability).

50. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992).

51. *See id.* at 1811. A criminal conviction is considered determinative of liability in a later civil or administrative action where the same acts are at issue due to the requirement that the elements of the crime be proven beyond a reasonable doubt; by contrast, the corporation's victory in a civil or administrative proceeding does not preclude a later criminal conviction for the same conduct because the burden of proof is less, such as a preponderance of the evidence. O'SULLIVAN, *supra* note 23, at 1034 (considering collateral estoppel in the context of parallel proceedings).

52. *See, e.g.*, U.S.S.G. app. A. (2000); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1479–92 (1996) (suggesting that virtually all criminal laws, except those requiring physical presence, such as rape or murder, can be committed by a corporation); Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 17 (2001) (identifying "roughly 970" criminal statutory provisions prescribing federal criminal penalties within the Sentencing Guidelines).

53. *See* U.S.S.G. ch. 8, pt. B, introductory cmt.; *see also infra* note 70.

54. Generally, base fines are determined by using the greatest of three alternatives: (1) the amount derived from the fine table, U.S.S.G. § 8C2.4(d); (2) "the pecuniary gain to the organization from the offense," *id.* § 8C2.4(a); or (3) the pecuniary loss caused by the offense, *id.* When the calculation of the pecuniary gain or loss "would unduly complicate or prolong the sentencing process," it is not used to determine the base fine. *Id.* § 8C2.4(c). The maximum fine available under the Organizational Sentencing Guidelines is limited by the statutory maximum fine, which is generally defined at 18 U.S.C. § 3571 (2000), and provides that the maximum fine for organizations is $500,000, or twice the gross gain or gross loss resulting from the offense, unless a greater fine is provided for in the specific statute upon which the conviction is based. *See* U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS, 11–14 (1991) (providing a detailed explanation of the underlying basis for the fine table). The fine may be reduced upon a court's determination of an organization's

restitution,[55] remedial orders,[56] community service,[57] public notice and apologies,[58] disgorgement,[59] and probation.[60] As a term of probation, an organization with fifty or more employees must implement a compliance program in accord with the Guidelines if it has not already adopted one.[61] Further conditions may include inspections and audits.[62] Although the Sentencing Commission recognized the possibility that organizations convicted of federal crimes might also face collateral sanctions[63] "such as debarment from government contracting, treble civil damages, shareholder derivative actions, [and] regulatory fines,"[64] the Commission did not provide in the Guidelines any "direct offset for collateral sanctions."[65] The Commission, however, did provide "means by which [such sanctions] may be taken into account" by the sentencing court, but only in the limited circumstance of closely held corporations.[66] Finally, the Guidelines provide for a corporate death

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inability to pay the calculated fine. U.S.S.G. § 8C2.2 (preliminary determination of inability to pay fine); *id.* § 8C3.3 (reduction of fine based on inability to pay).

55. U.S.S.G. § 8B1.1 (restitution—organizations). Restitution is to be ordered "for the full amount of the victim's loss" unless restitution has already been paid, "the number of identifiable victims is so large as to make restitution impracticable," or the court determines that due to the "complex issues of fact . . . the need to provide restitution to any victim is outweighed by the burden on the sentencing process." *Id.* § 8B1.1(b)(1)–(2).

56. *Id.* § 8B1.2 (remedial orders—organizations).

57. *Id.* § 8B1.3 (community service—organizations).

58. *See id.* § 8D1.3(c) (conditions of probation—organizations) (providing that "[t]he court may impose other conditions [of probation] that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing"); *id.* § 8D1.4(a) (recommended conditions of probation—organizations) (providing that the court may order the organization at its own expense to publicize the fact and nature of the conviction, punishment, and remedial steps to avoid future recurrence of misconduct).

59. *Id.* § 8C2.9 (disgorgement).

60. *Id.* § 8D1.1 (imposition of probation—organizations); *id.* § 8D1.2 (term of probation—organizations); *id.* § 8D1.3 (conditions of probation—organizations).

61. *Id.* § 8D1.4(c)(1) (recommended conditions of probation—organizations).

62. *Id.* § 8D1.4(c)(4).

63. Recommendations to the Sentencing Commission during the drafting of the Organizational Sentencing Guidelines included provisions for offsetting civil damages and regulatory fines against criminal sanctions. *See* U.S. SENTENCING COMM'N, DISCUSSION MATERIALS ON ORGANIZATIONAL SANCTIONS, pt. IV, at 18–174 (July 1988).

64. U.S. SENTENCING COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 21 (2003), *available at* http://www.ussc.gov/corp/advgrprpt/advgrprpt.htm [hereinafter U.S.S.C. REPORT]; *see also* Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 245 (1993).

65. Nagel & Swenson, *supra* note 64, at 247.

66. *Id.* at 246–48. *But see* U.S.S.G. § 8C3.4 (exception for closely held corporations permitting offset from the fine when an owner with at least a five-percent interest in the corporation is fined in a federal proceeding for the same conduct underlying the corporate offense). Professor Kathleen Brickey has deemed section 8C3.4 "a curious rule," suggesting that exceptions for owners in closely held corporations ignore the benefits of corporate structure and place form over substance. Kathleen F. Brickey, *Close*

penalty by imposing fines large enough to divest a corporation of all of its net assets,[67] although the application of this provision is limited to instances where the organization is found to exist for a primarily "criminal purpose."[68] Under this provision, shareholders are punished for the conduct of managers. Such harsh punishment may be appropriate if the corporation exists primarily for a "criminal purpose" and not when the shareholders may be innocently unaware of corporate criminal conduct.

While imposing a death penalty on corporations might seem draconian in a legal system already overwhelmed with get-tough-on-crime measures, the death penalty already exists for some corporate crimes, even if it is not so characterized. For some businesses, the imprisonment of the owners can lead to its demise.[69] Additionally, the financial injury of a large fine,[70] the cost of a criminal defense, or the negative publicity from reaction to public reports of potential criminal acts or liability can weaken an entity's competitive position and increase the cost of doing business to the point of bankruptcy[71] or even liquidation.[72] Even if the business is

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Corporations and the Criminal Law: On "Mom and Pop" and a Curious Rule, 71 WASH. U. L.Q. 189, 202–04 (1993).

67. U.S.S.G. § 8C1.1.

68. *Id.* Reported cases in which this provision has been applied are scarce. *But see* KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME 912–13 (3d. ed. 2002) [hereinafter BRICKEY, CORPORATE AND WHITE COLLAR CRIME] (describing the application of the "corporate death penalty" for "criminal purpose organizations," U.S.S.G. § 8C1.1, to American Precision Components, Inc., which pled guilty to fraud for providing substandard hardware for space projects (including o-rings such as those that doomed the ill-fated Challenger space shuttle), and noting that the corporation had a history of similar misconduct, having been debarred for eighteen months from government contracts for supplying substandard hardware to build nuclear submarines).

69. Imprisonment of owners of closely held corporations can lead to failure of corporations and consequent loss of jobs for innocent employees. One example is the story of Mickey Monus, cofounder and president of the 300-unit Phar-Mor drugstore chain, who was convicted in federal court in 1995 of forty-eight criminal counts involving embezzlement and fraud. His scheme to defraud through misstatement of company sales and earnings defrauded investors and creditors of out of more than $1 billion, threw Phar-Mor into bankruptcy, closed stores, and put about 20,000 employees out of work. ROSOFF ET AL., *supra* note 9, at 404–05 (citing and quoting Faye Brookman, *Deep Discounter Phar-Mor Declares Bankruptcy*, DRUG TOPICS, September 7, 1992, at 84–85; Glenn Collins, *Ousted Phar-Mor President Found Guilty in $1 Billion Fraud*, N.Y. TIMES, May 26, 1995, at D3; *Monus, Co-Founder of Phar-Mor Gets a 20-Year Sentence*, WALL ST. J., Dec. 4, 1995, at B5; Jolie Solomon, *Mickey's Secret Life*, NEWSWEEK, Aug. 31, 1992, at 70–72).

70. *See, e.g.*, United States v. Eureka Labs., Inc., 103 F.3d 908, 910, 912 (9th Cir. 1996) (finding that section 8C3.3 of the Sentencing Guidelines did not preclude the trial court from imposing a fine jeopardizing Eureka's continued viability so long as such fine did not impair the company's ability to provide restitution, and affirming criminal fine imposed on the company for conviction for fraudulent manipulation of analytical tests provided to the U.S. Environmental Protection Agency ("EPA"), the U.S. Department of the Army, and the U.S. Air Force). The district court imposed the $1.5 million fine even though the EPA debarred Eureka after its conviction, thereby eliminating 60–70% of the company's business, which had come from government contracts. *Id.* at 911.

71. *See infra* note 82.

72. *See infra* note 82.

convicted and sentenced to a relatively low criminal fine or restitution, civil lawsuits based upon the underlying proven criminal conduct can be even more injurious[73] because the standard of proof for establishing civil liability is lower than the "beyond a reasonable doubt" standard mandated in criminal prosecutions.[74]

B. Civil Liability

Early studies of white-collar crime looked at civil liability cases as well as criminal liability cases.[75] Sources of civil litigation include shareholders who may bring private securities fraud actions to challenge corporate misconduct.[76] Shareholders can also bring derivative lawsuits on behalf of the corporation against the corporation's officers or directors for damages they caused the

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73. *See infra* Part II.B; *see also, e.g.*, Charles F. Willson et al., *What the Courts May Not be Telling Defendants: Collateral Consequences of Guilty Pleas in the Massachusetts Criminal Justice System*, BOSTON BUS. J., Feb. 2003, at 10, 13 (identifying springboard civil litigation as one of several unintended consequences of corporate guilty pleas, which include forfeiture of the corporation's license to do business, exclusion or debarment from federal funding programs, and unwanted publicity).

74. *See* Vikrameditya S. Khanna, *Politics and Corporate Crime Legislation*, REGULATION 30, 32 (Spring 2004) (recognizing that due to greater private civil enforcement and higher criminal procedural standards, "corporations would prefer corporate crime legislation").

75. *See* CLINARD, ILLEGAL CORPORATE BEHAVIOR, *supra* note 12, at 22; EDWIN SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 13–14, 45–53 (Yale University Press 1983). Known as "The Uncut Version," the 1983 Sutherland publication includes the names of the corporations that Sutherland included in his study, which he excluded from the 1949 edition of the book published by Dryden Press. The identifying names of the corporations were excluded at that time due to pressure from the publisher, who was concerned that it might be sued by the corporations based upon Sutherland's characterization of the violations as "criminal" despite the civil or administrative nature of the legal proceedings. *Id.* at x–xi.

76. While an individual may sue for securities fraud, the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) ("PSLRA"), has effectively limited claims through various procedural barriers. These barriers include: a heightened pleading standard; enhanced sanctions against plaintiffs; limits on discovery; restrictive causation standards; and limits on class action suits. *See* Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1072–79 (1999) [hereinafter Ramirez, *Arbitration and Reform*]. Professor Ramirez concludes that such reforms have led to "the *de facto* de-federalization of private securities claims." *Id.* at 1080. States have followed the lead of the PSLRA in enacting similar legislation. *Id.* at 1081 (noting the desire of states to encourage business development within their borders). Further restricting civil remedies, the Securities Litigation Uniform Standards Act of 1998 precluded state court securities class actions involving publicly traded companies. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (amending scattered sections of 15 U.S.C. §§ 77–78); *id.* § 101 (amending 15 U.S.C. §§ 77p, 78bb); *see* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 533 (2000) [hereinafter Ramirez, *Depoliticizing*] (discussing the effects of enacting the Uniform Act).

corporation.[77] Additionally, qui tam civil lawsuits are available against corporations under some federal statutes permitting a private citizen to sue on behalf of the government to recover damages and penalties.[78] If the qui tam lawsuit is successful, the citizen may be entitled to 10–30% of the recovery, depending upon the government's level of participation in the lawsuit.[79] Furthermore, corporations can be sued for products liability, intentional torts, negligence, and fraud.[80]

Private civil litigation is one means of deterring and punishing corporate misconduct. Although civil liability is sufficient to address the misconduct,[81] civil litigation can sometimes act as an indirect form of the death penalty. That is, the cost of litigation, the cost of damage awards, and the cost of bad publicity from civil litigation, separately or in combination, can propel a company into bankruptcy.[82] This fatal outcome may also arise when the government brings civil litigation against an offending entity.[83] Entities are subject to a multitude of municipal, state, and federal[84] regulations governing innumerable aspects of the

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77. *See* MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 928–29 (8th ed. 2000) (stating requirements and theory underlying derivative claims).

78. The False Claims Act, 31 U.S.C. §§ 3729–3731 (2000), provides for qui tam actions by private persons brought in the name of and on behalf of the United States. *Id.* § 3730(b); *see* JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME 456–58 (1996) (describing the qui tam action and the process for government intervention). *See generally* Ben Depoorter & Jef De Mot, *Whistle Blowing* (George Mason University School of Law Working Papers Series, Paper No. 13, 2004), *available at* http://law.bepress.com/gmulwps/gmule/art13 (evaluating the efficiencies of using rewards and incentives to identify corporate fraud).

79. If the government proceeds with the civil claim, the relator is entitled to 10–25% of the award, 31 U.S.C. § 3730(d)(1); if the government chooses not to proceed with the claim, the relator is entitled to 25–30% of any award if he or she proceeds with the case, *id.* § 3730(d)(2).

80. *See, e.g.*, Cippollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (fraudulent misrepresentation of exposure to carcinogens); *cf.* Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT. 237, 255–56 (2005).

81. "According to the 2003 PricewaterhouseCoopers Securities Litigation Study, in 2003, private securities litigation settlements for $20 million or greater totaled more than $2.2 billion, compared with $1.57 billion in 2002." *Litigation Trends, PwC Study of 2003 Securities Litigation Sees High Level of Accounting Allegations*, 2 BNA CORPORATE ACCOUNTABILITY REPORT, Aug. 6, 2004, at 837; *see* PRICEWATERHOUSECOOPERS LLP, 2003 PRICEWATERHOUSECOOPERS SECURITIES LITIGATION STUDY 8 (2004), *available at* http://www.10b5.com/2003_study.pdf [hereinafter PWC STUDY].

82. An apt example is the experience of Drexel Burnham Lambert. In February 1990, Drexel Burnham Lambert filed for bankruptcy on the heels of the junk-bond debacle created by its employee, Michael Milken. By that time, Drexel had already pled guilty to federal racketeering charges filed in November 1988, agreeing to pay a $650 million fine. STEPHEN M. ROSOFF ET AL., PROFIT WITHOUT HONOR, WHITE-COLLAR CRIME AND THE LOOTING OF AMERICA 246 (2004).

83. *See infra* Part I.C.

84. Not only are companies subject to domestic review, but in a global economy, companies doing business abroad are also subject to foreign government oversight. *See,*

business environment.[85] Violation of such regulations may result in minimal sanctions, such as a warning or a small fine, or give rise to extensive civil litigation,[86] substantial fines,[87] and other significant sanctions.[88]

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e.g., Byron Acohido & Noelle Knox, *Regulators Want Microsoft to Pull Media Player Out*, USA TODAY, Mar. 25, 2004, at B1 (reporting that "[t]he European Commission ruled that Microsoft abused its monopoly of the Windows operating system, . . . fined Microsoft a record $613 million[,] and placed restrictions on the sale of two key Microsoft products . . ."). One might argue the global economy is a double-edged sword because as countries seeking a global market for their products enter into trade agreements such as the General Agreement on Tariffs and Trade and become members of organizations, such as the World Trade Organization, those governments that are a party to the organization or agreement give up some regulatory autonomy while enhancing the profits and thereby the power of the corporate interests. *See* BAKAN, *supra* note 10, at 22–25.

85. *See, e.g.*, MICHAEL WATKINS ET AL., WINNING THE INFLUENCE GAME 3–6 (2001) (describing some of the ways in which government regulation impacts business, including determining "who owns what information," "which standards dominate and how they are developed," "what can and cannot be exported," as well as placing "restrictions on mergers, alliances, and acquisitions," and "impos[ing] taxes"). Regulations impacting business include employment relations, physical space regulations, product standards, and environmental considerations. *Id.* Governmental regulations, enforced by government bureaucrats, have been attacked as a "major barrier to productive economic activity." MURRAY L. WEIDENBAUM, THE FUTURE OF BUSINESS REGULATION 6 (1979).

86. *See, e.g.*, Julie Appleby, *Tenet Healthcare to Pay $30.7M to Settle Separate Investigations*, USA TODAY, Mar. 25, 2004, at B6 (reporting that in 2004, Tenet Healthcare, which owns 100 hospitals nationwide, agreed to pay $30.7 million to settle two federal investigations that started in 1997 concerning payments for patient referrals and overbilling Medicare); *supra* note 81.

87. *See, e.g.*, Press Release 2002-52, U.S. Sec. & Exch. Comm'n, Xerox to Pay Largest Financial Fraud Penalty Ever Against Public Company (Apr. 11, 2002), *available at* http://www.sec.gov/news/press/2002-52.txt (announcing Xerox's agreement to pay a $10 million fine to settle an SEC fraud investigation, the largest civil fine ever reportedly paid by a company in an accounting case); *see also* Floyd Norris & Claudia H. Deutsch, *Xerox to Restate Results and Pay Big Fine*, N.Y. TIMES, Apr. 2, 2002, at C1. At that time, the previous record was a $3.5 million civil fine paid by America Online in a 2000 settlement with the SEC. *Id.* In 2001, Arthur Andersen settled civil fraud allegations involving audits of its client Waste Management, agreeing to pay a $7 million fine. *Id.*

88. *See, e.g.*, PWC STUDY, *supra* note 81, at 12 (recognizing that "[t]he SEC wields almost unlimited power to debar officers and directors, impose fines and penalties, obtain disgorgements, and prevent professionals from practicing before the Commission"); *see also* Press Release 2004-147, U.S. Sec. & Exch. Comm'n, KPMG LLP and Four Auditors Sanctioned for Improper Professional Conduct in Connection with Gemstar-TV Guide International, Inc. Audits (Oct. 20, 2004), *available at* http://www.sec.gov/news/press/2004-147.htm (sanctions included censure, KPMG's "agreement to pay $10 million to harmed Gemstar shareholders," and suspensions from practicing before the SEC for the four auditors); Press Release 2003-34, U.S. Sec. & Exch. Comm'n, SEC Charges HealthSouth Corp. CEO Richard Scrushy With $1.4 Billion Accounting Fraud (Mar. 19, 2003), *available at* http://www.sec.gov/news/press/2003-34.htm; *infra* note 101. In related civil actions, Gemstar agreed to pay a $10 million civil penalty, and its former copresident agreed to pay $600,000 in disgorgement and penalties. Press Release 2003-34, *supra*.

C. Government Regulatory, Administrative, and Civil Actions

Criminal convictions can lead to mandatory debarment or delicensing, thereby eliminating government entities as a source of business for the convicted corporation and further reducing its opportunities to compete in the marketplace.[89] For example, healthcare providers and suppliers[90] convicted of certain enumerated fraud-related crimes face the mandatory requirement of exclusion for a minimum of three years[91] from participation in all federal healthcare programs.[92] The exclusion provision, deemed the "death penalty,"[93] is broad in scope;[94] it applies to individuals and entities, covering felonies involving *any* healthcare program,[95] not

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89. *See, e.g.*, *supra* note 70.

90. In 1995, the U.S. government estimated that the cost of intentional fraud and abuse in the healthcare industry was about 10% of the more than $1 trillion industry. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT ON MEDICARE FRAUD AND ABUSE, GAO/HR-95-8, at 6 (Feb. 1995); *see also* J. Stuart Showalter, *Healthcare Fraud and Abuse*, *in* BACK TO BASICS: FOUNDATIONS OF HEALTHCARE MANAGEMENT 189 (Health Admin. Press ed., 2001) (reviewing the federal laws and sanctions that are commonly applied to address healthcare fraud and abuse).

91. The three-year mandatory provision is a minimum exclusionary period with the possibility of a longer exclusion period for minor aggravating factors. Aggravating factors for mandatory exclusion include, among others: that there is an expected financial loss of $5,000 or more to the government or other entities; that the criminal acts extended over a period of one year or more; and that the sentence included incarceration. 42 C.F.R. § 1001.201(b)(1) (2005). Aggravating factors for permissive exclusion include obstruction. *Id.* § 1001.301(b)(2).

92. Social Security Act, 42 U.S.C. § 1320a-7 (2000); Kathy B. Weinman, *The Health Care Death Penalty: Exclusion from Participation in Federal Health Care Programs*, *in* WHITE COLLAR CRIME 2003 P-13 (ABA Ctr. for Continuing Legal Educ. & the Criminal Justice Sys. 2003).

93. Pamela H. Bucy, *Civil Prosecution of Health Care Fraud*, 30 WAKE FOREST L. REV. 693, 720 (1995); Amy Schofield & Linda Weaver, *Health Care Fraud*, 37 AM. CRIM. L. REV. 617, 621 n.23 (2000); Weinman, *supra* note 92, at P-13.

94. In addition to the mandatory provisions, permissive exclusion provisions reach even further in scope, including federal, state, and local nonhealthcare government-funded programs and healthcare-related misdemeanors. 42 U.S.C. § 1320a-7(b)(1)–(3). Exclusion can be applied for obstruction of government program related investigation, and "unlawful manufacture, distribution, prescription, or dispensing of a controlled substance." The statute further provides for permissive exclusion on independent findings of misconduct by the Inspector General that do not require a court conviction. *See id.* § 1320a-7(b)(6), (7), (14). Businesses or organizations associated with excluded individuals or entities may also be excluded, so that a mere 5% ownership of an entity by an excluded individual can result in exclusion of the entity and, conversely, an owner or controlling individual of an excluded entity may also be excluded. *Id.* § 1320a-7(b)(8), (15); 42 C.F.R. § 1001.1051; Weinman, *supra* note 92, at P-14 to P-15. Moreover, government payments to nonexcluded entities for services or items furnished by an excluded party are prohibited. 42 U.S.C. §§ 1320a-7b(f), 1320a-7(h); 42 C.F.R. § 1001.1901; Weinman, *supra* note 92, at P-15. Parties may check the Department of Health and Human Services ("HHS") website to view a list of excluded individuals and entities, and indeed, HHS "recommends that providers check the list before employing or contracting with *anyone*." *Id.* at P-16 (emphasis added).

95. 42 U.S.C. § 1320a-7(a)(1)–(4); 42 C.F.R. § 1001.101(c)–(d).

just *federally* funded programs.[96] Upon completion of the imposed exclusion period, the affected party must apply for reinstatement,[97] which can be denied without administrative or judicial review for reasons such as disregarding an exclusion order.[98] Thus, the detection of illegal conduct in the healthcare area can lead to serious, if not fatal, consequences for the career of an individual or the existence of a business entity.[99] Probable offenders face the threat of exclusion; consequently, prosecutors must factor the mandatory or permissive exclusion into the decision to prosecute and the resolution of such investigations.[100]

Debarment, delicensing, and delisting are also available remedial civil sanctions for corporate misconduct in the securities industry,[101] in defense

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96. Thus, an indirect relationship such as embezzling funds from a not-for-profit foundation specializing in radiology treatment and care of children was deemed sufficiently related because it had "an effect on the provision of care." Weinman, *supra* note 92, at P-14 (citing Kirks v. Inspector General, Cr. No. 765, 2001 HHSBAD Lexis 53, at *11 (2001)).

97. 42 U.S.C. § 1320a-7(g); Weinman, *supra* note 92, at P-17.

98. 42 C.F.R. §§ 1001.3002, 3004, 1901(b)(3) (providing that violation of order is basis for denial or reinstatement); *see also* Weinman, *supra* note 92, at P-18. There are additional civil monetary penalties and criminal liability beyond the risk of denial of reinstatement for excluded parties who disregard the order. 42 C.F.R. § 1001.1901(b)(1), (3); 42 U.S.C. § 1320a-7a (civil liability for excluded individuals who retain ownership in participating organizations); *id.* § 1320a-7b (criminal liability).

99. The purpose of the exclusion provisions is remedial. "Congress believed Medicaid and Medicare programs could best be protected by excluding those convicted of financial felonies in connection with health care generally." Weinman, *supra* note 92, at P-14 (citing Kirks, Cr. No. 765, 2001 HHSBAD Lexis 53, at *19 (citing S. REP. NO. 109, 100th Cong., 1st Sess. 7, 1987 U.S.C.C.A.N. 682)).

100. Defense attorneys seek to avoid criminal conviction so as to skirt at least the mandatory provisions of the statute, but even a civil resolution could lead to permissive exclusion for their clients. Weinman, *supra* note 92, at P-18 to P-19. The results of such investigations for some corporations have been cobbled global settlements with guilty pleas to crimes outside the mandatory exclusion provisions, civil judgments with fines and restitution that may fall within the permissive language of the exclusion provisions, and agreements by the Office of the Inspector General ("OIG") not to pursue permissive exclusion but requiring corporations to enter into comprehensive and costly Corporate Integrity Agreements ("CIA"), which, if violated, would lead to exclusion. *Id.* at P-19 to P-20 (discussing cases, such as United States v. TAP Pharm. Prods. Inc., Criminal No. 10354 (D. Mass. 2001)). In another case cited by Professor Weinman, United States v. NMC Homecare, Inc., Criminal No. 10017 (D. Mass. 2000), the parties opted to have three subsidiaries of Fresenius' subsidiary, National Medical Care, Inc., plead guilty to charges for which they would be excluded, while the parent companies entered into a separate civil settlement agreement permitting them to continue operating and including an assurance by OIG not to pursue permissive exclusion, but requiring a CIA for the defendants. Weinman, *supra* note 92, at P-19 to P-21. *See, e.g.*, ISRAEL, *supra* note 78, at 451–52 (describing attorney Charles Ruff's experience in negotiating and navigating the breadth of the 1995 National Medical enterprises global settlement).

101. Not only may the business lose its license, but so may individual brokers and investment advisors. 15 U.S.C. § 78o(b)(4)(B)(i)–(iv) (2000 & Supp. 2002); 15 U.S.C. §§ 80b-2(a)(11), 80b-3(e) (Supp. 2002). Furthermore, individuals may be barred by the SEC from employment as an employee, officer, director, investment adviser, or principal underwriter with any investment company, bank, or insurance company for willfully violating or aiding or abetting the violation of the Securities Act of 1933, the Securities

procurement,[102] and even for directors and officers of public companies.[103] Such exclusion from participation may be permanent or temporary, and for a definite or an indefinite period. Thus far, however, there is no bar for merely fostering or tolerating a criminal culture within a corporation.

Additionally, states chartering corporations routinely reserve the statutory power to repeal, forfeit, or suspend corporate charters for certain specified acts,[104] such as the commission of criminal offenses,[105] the failure to file required reports, or the failure to pay taxes.[106] However, state authorities might refrain from exercising this power because of the suddenness of the penalty of revocation, the potential for disrupting financial markets, and the loss of state chartering revenues. A recent trend in government sanctions is corporate deferred prosecution

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Exchange Act of 1834, or specified provisions of the Investment Companies Act. 15 U.S.C. § 80a-9(b) (2000). *See* BRICKEY, CORPORATE AND WHITE COLLAR CRIME, *supra* note 68, at 914–15 (describing the circumstances under which loss of license debarment and delisting (from the New York Stock Exchange ("NYSE")) may be imposed upon individuals or companies). The SEC has indicated it intends to continue this trend. In March 2004, Scott Sullivan, former CFO of WorldCom Inc., agreed to a permanent bar as part of his guilty plea to criminal charges. U.S. Sec. & Exch. Comm'n, Litigation Release No. 18605, SEC Charges Scott D. Sullivan, Worldcom's Former CFO, with Engaging in Multi-Billion Dollar Financial Fraud (Mar. 2, 2004), *available at* http://www.sec.gov/litigation/litreleases/lr18605.htm.

102. *See, e.g.*, *supra* note 68; *see also supra* note 70.

103. Under the Sarbanes-Oxley Act of 2002, a federal district court may enter a suspension or bar order by finding the defendant "unfit," which is a change from the prior standard of substantial "unfitness." Pub. L. No. 107-204, § 305, 116 Stat. 745, 778 (amending 15 U.S.C. §§ 77t(e), 78(u)(d)(2)); *see* 15 U.S.C. § 77t(e) (2000) (Securities Act); *id.* § 78u(d)(2) (Exchange Act). Additionally, banking regulators may unilaterally suspend and bar banking officials. *See* 12 U.S.C. § 1818(e)(1) (2000) (debarment is permitted when a banking official "engaged or participated in any unsafe or unsound [banking] practice" that had or could have prejudiced the insured depository institution's depositors); *see also id.* § 2264(b) (2000) (providing for debarment of director or officer of institution governed by Farm Credit System). *See generally* Jayne W. Barnard, *SEC Debarment of Officers and Directors After Sarbanes-Oxley*, 59 BUS. LAW. 391, 391–92, 409 (2004). Finally, with respect to criminal sanctions, the Sentencing Guidelines also provide for debarment of individuals convicted of securities fraud and other white-collar crimes. *See* U.S.S.G. § 5F1.5 (occupational restrictions) (providing that when a court determines that it is reasonably necessary to protect the public from further harm, it may impose a condition of probation or supervised release restricting the individual's ability to work in his business or profession if the misconduct was related to the business or profession).

104. *See generally* 19 AM. JUR. 2D *Corporations* §§ 2391–2417 (2004). Each state provides within its chartering of corporations for the ability to dissolve the corporation, quo warranto, if the corporation is engaged in illegal conduct. *See* EISENBERG, *supra* note 77, at 126 (states may use quo warranto action to revoke corporate charter in the event of corporate misconduct, although the codified action is not necessarily referred to as "quo warranto"); *see, e.g.*, CAL. CORP. CODE § 1801(a) (Deering 1977); DEL. CODE ANN. tit. 8, § 283 (2001); N.Y. BUS. CORP. LAW § 109 (McKinney 2003); KAN. STAT. ANN. § 17-6104(c) (1995). *See generally* Simon Rosenzweig, Note, *Corporations; Quo Warranto: Forfeiture of Franchise on Account of Crime*, 13 CORNELL L.Q. 92 (1927).

105. 19 AM. JUR. 2D *Corporations* § 2400 (2004) (commission of illegal acts).

106. *Id.* § 2401 (failure to make report or to pay taxes).

agreements ("DPAs").[107] The deferred prosecution agreement permits a corporation to civilly resolve a criminal investigation by agreeing to similar terms that might be included in a corporate criminal sentence, including terms such as restitution, fines, additional auditing measures, termination of responsible individuals, and probation.[108] Additionally, the DPAs typically include acceptance of responsibility (that may include a specific admission of facts), an obligation of ongoing cooperation (that may include waiver of the attorney-client privilege and the work product privilege), and a probation period of eighteen months to two years.[109] DPAs were developed to avoid the criminal process in resolving investigations of individuals involved in minor crimes, deter future criminality, provide restitution for victims, and conserve prosecutorial and judicial resources.[110] The program has been actively employed since 2003 to resolve extensive investigations of corporate fraud.[111] The DPAs offer corporations the

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107. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-22.010 to 9-22.200 (1997) [hereinafter U.S.A.M.] (pretrial diversion program); Steven R. Peikin, *Outside Counsel; Deferred Prosecution Agreements: Standard for Corporate Probes*, N.Y. L.J., Jan. 31, 2005, at 4 (describing the deferred prosecution agreement process being used by the U.S. Department of Justice ("DOJ"), and identifying twelve investigations of corporate criminal wrongdoing since January 2003 that have been resolved through this process); Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and U.S. Attorneys, regarding Principles of Federal Prosecution of Business Organizations, Part VI.B (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memorandum] (providing authorization for corporate deferred prosecution agreements as an alternative to criminal charges); F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121 (1997) (examining deferred prosecution agreements and their use when criminal prosecution would jeopardize the viability of a corporation and harm innocent employees and stakeholders).

108. *See* Peikin, *supra* note 107 (describing typical features of DPAs); Warin & Schwartz, *supra* note 107, at 131–33 (same).

109. *See* sources cited *supra* note 108.

110. *See* Warin & Schwartz, *supra* note 107, at 123 (explaining that the guidelines in the U.S. Attorneys' Manual for the pretrial diversion program are designed for cases against individuals rather than potential corporate defendants); U.S.A.M., *supra* note 107, § 9-22.010; *Off the Hook: Deferred Prosecution Agreements on the Rise*, CORP. CRIME REP. (Dec. 13, 2004), *available at* http://www.corporatecrimereporter.com/deferredpros121004.htm [hereinafter *Off the Hook*] (criticizing the use of DPAs to address corporate criminality as letting corporations "off the criminal hook").

111. *See* Peikin, *supra* note 107 (citing twelve major investigations of corporate wrongdoing resolved through DPAs, including the following: June 2003, a subsidiary of PNC Financial Services Group; March 2004, MCI, successor to WorldCom; November 2004, American International Group; December 2004, America Online; January 2005, Monsanto). From 1996 to 2004, Peikin was an assistant U.S. attorney for the U.S. Attorney's Office, Southern District of New York, and chief and deputy chief of the Securities and Commodities Fraud Task Force. *Id.* Although the Thompson Memorandum, *supra* note 107, appeared to open the door to corporate DPAs, the U.S. Attorney's Office for the Southern District of New York effectively employed this resolution as early as 1992 with Salomon Inc. and Salomon Brothers Inc. *See* Warin & Schwartz, *supra* note 107, at 122 (also citing three other early instances of DPAs: June 1993, Sequa Corporation; October 1994, Prudential Securities Inc.; and September 1996, Coopers & Lybrand).

opportunity to avoid the collateral consequences of a criminal conviction,[112] while offering the prosecution the opportunity to set fines and collect restitution outside the limits of the judicial process and the opportunity to gain the corporation's cooperation.[113] Both parties benefit from resource savings. The DPAs are a step toward balancing the collateral consequences of convicting a major business entity with the need to stop corporate criminality. The fact that they are "greeted with enthusiasm by investors and other stakeholders,"[114] however, may suggest that the interests of financially related parties are being placed above long-term deterrence.

D. Recent Reforms Aimed at Transparency, Improved Ethics, and Deterrence

1. Fostering the Good Corporate Citizen

The savings-and-loan crisis and the junk-bond debacle of the 1980s created pressure to step up prosecution of white-collar crime.[115] The Sentencing Commission's recommendations for the sentencing of organizations became effective November 1, 1991, four years after the adoption of sentencing guidelines for individuals.[116] In fashioning sentencing guidelines for corporations and other organizations,[117] the Sentencing Commission settled upon a mix of sanctions to justly punish and adequately deter, and to provide incentives to encourage the prevention, detection, and reporting of corporate criminal conduct.[118] Consequently, in addition to providing for specific punishment, the Sentencing

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112. *See supra* notes 63–64 and accompanying text (discussing the collateral consequences of criminal prosecution).

113. *See* Peikin, *supra* note 107 (assessing the reasons for the rising trend in corporate DPAs).

114. *See id.*

115. A study on securities violations from 1984 to 1991 revealed that there was a "dramatic increase in securities-related cases received during [that] time period, from 129 matters in 1984 to 424 in 1991," along with a doubling in the number of securities-offense-related convictions; the authors recognized, however, that the increase in total volume could be the result of increased illegal behavior during the time period studied or an increase in initiative by the SEC in investigating such crime. *See* Kip Schlegel et al., *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 133–34, 139–40 (2000–2001). Stepped-up prosecution did not lead to greater sentencing severity; the study discovered that the length of imprisonment remained relatively constant over the period studied, and the fines imposed actually decreased over the same period. *Id.* at 135–36; *see also* Kitty Calavita & Henry N. Pontell, *The State and White-Collar Crime: Saving the Savings and Loans*, 28 LAW & SOC'Y REV. 297, 301 (1994) (noting that in reaction to the savings and loans scandals, President George H.W. Bush promised, "We will not rest until the cheats and chiselers and the charlatans spend a large chunk of their lives behind the bars of a federal prison").

116. U.S.S.G. ch. 8, introductory cmt. (historical note referencing app. C, amend. 673).

117. Chapter 8 (Sentencing of Organizations), defines "organization" using the statutory definition of organization in 18 U.S.C. § 18 (2000). U.S.S.G. § 8A1.1, cmt. n.1. Thus, for purposes of Chapter 8, "organization" means "a person other than an individual" and "includes corporations, partnerships, associations, joint stock companies, unions, trust, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations." *Id.*

118. *See* U.S.S.G., ch. 8, introductory cmt.

Commission developed criteria for establishing an effective compliance program[119] that would "foster[] good corporate citizenship."[120] Incentives for adopting an effective compliance program[121] include the mitigation of punishment by lowering the fine level[122] and the possible avoidance of probation.[123] This "carrot and stick" approach is intended to yield better satisfied employees and positive reputational value, as well as to lower risk of corporate criminal liability.[124]

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119. *See* Paula Desio, *An Overview of the Organizational Guidelines*, *in* WHITE COLLAR CRIME 2003 D-69 (ABA Ctr. for Continuing Legal Educ. & the Criminal Justice Sys. 2003) (describing seven key criteria for establishing an "effective compliance program"); *see also* U.S.S.G. § 8A1.2, cmt. n.3 (k)(1-7) (2003) (defining an "effective program to prevent and detect compliance"—as used in U.S.S.G. §§ 8C2.5(f) and 8D1.1(3)—and setting forth the seven criteria, emphasizing that they are the minimum criteria to demonstrate an organization's due diligence in creating "an effective program to prevent and detect violations of law"). The compliance standards were broadly drawn to "encourage flexibility and independence by organizations in designing programs that are best suited to their particular circumstances." Desio, *supra*. As discussed *infra* at notes 135–41 and accompanying text, the 2004 amendments revised these criteria and elevated them to guideline status. U.S.S.G. § 8B2.1 (effective compliance and ethics program).

120. In 1995, the Sentencing Commission sponsored a symposium on corporate crime, entitled, "Corporate Crime in America: Strengthening the 'Good Citizen' Corporation." U.S. SENTENCING COMM'N, PROCEEDINGS OF THE SECOND SYMPOSIUM OF CRIME AND PUNISHMENT IN THE UNITED STATES, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION (Sept. 7–8, 1995), *available at* http://www.ussc.gov/sympo/wcsympo.pdf [hereinafter U.S.S.C. SYMPOSIUM].

121. Of course the corporation must overcome the difficulty in proving that a compliance program is effective despite the conviction for criminal conduct. This difficulty is not to be underestimated, given that only three corporations have actually received a reduction in sentence based upon having "an effective compliance program." *See* Frank O. Bowman, III, *Drifting Down the Dnieper with Prince Potemkin: Some Skeptical Reflections About the Place of Compliance Programs in Federal Criminal Sentencing*, 39 WAKE FOREST L. REV. 671, 684 (2004) (citing to Sentencing Commission federal sentencing statistics for years 1993 through 2002). Although a reduction of sentence may be rare, the decision against criminally charging a corporation due to its compliance program and subsequent cooperation is available as well. *See supra* note 107 (regarding deferred prosecution agreements).

122. U.S.S.G. § 8C2.5(f) (affording reduction in organization's culpability score for effective program to prevent and detect violations of law). *But see id.* § 8C4.10 (recognizing that where the organization implemented the compliance program in response to a court order specifically directing it to do so, an upward departure in sentencing may be warranted to offset, in whole or in part, a reduction under § 8C2.5(f)). An organization may also reduce its culpability score by self-reporting, cooperation, and acceptance of responsibility. U.S.S.G. § 8C2.5(g).

123. U.S.S.G. § 8D1.1(3) (applies to organizations with fifty or more employees).

124. ETHICS RESOURCE CENTER, 2000 NATIONAL BUSINESS ETHICS SURVEY, REPORT SUMMARY, http://www.ethics.org/2000survey.html (finding that employee satisfaction is higher in an organization that includes key elements of ethics program); *see also* ETHICS RESOURCE CENTER, 2003 NATIONAL BUSINESS ETHICS SURVEY, EXECUTIVE SUMMARY (on file with author) [hereinafter ETHICS RESOURCE CENTER, 2003 SURVEY] (comparing results of its 2000 survey with its 2003 survey to conclude that that employees perceive good business ethics as being incorporated into the business through modeling by

Unfortunately, the Organizational Sentencing Guidelines did not yield the deterrent effect intended.[125] Indeed, corporate financial scandals blazed headlines across the United States beginning in the fall of 2001[126] and continuing through 2005.[127]

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top management and opportunity to report misconduct, that observed ethical misconduct has decreased, and that reporting of unethical conduct has increased); *see also infra* note 134. *But see* Gary R. Weaver et al., *Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressure, and Corporate Ethics Practices*, 42 ACAD. MGMT. J. 539 (1999) (study suggesting that adopting a compliance program in response to government pressure can be easily decoupled from daily business practices).

125. For example, Enron Corporation filed for bankruptcy protection on December 2, 2001, "amid allegations that Enron artificially boosted profits and hid debts totaling over $1 billion." U.S.S.C. REPORT, *supra* note 64, at 35. Subsequent to its implosion, Enron was found to have: manipulated natural gas prices in 2001, *see* Bradley Keoun, *Judge Approves Enron's Settlement with Regulator*, WASH. POST, July 20, 2004, at E3; engaged in accounting manipulation and securities fraud, *see* Carrie Johnson, *Guilty Plea in Enron Case*, WASH. POST, July 31, 2004, at E1; and manipulated electricity prices through fraudulent schemes, *see* Peter Behr, *Enron Owes West Coast $32.5 Million Refund*, WASH. POST, July 23, 2004, at E3. Incredibly, in Enron's case, the board of directors voted to waive key provisions in its code of conduct to allow off-the-books partnerships. *See* Press Release, Ethics Resource Center, Why Wasn't Enron's Code of Conduct Enough? (Mar. 18, 2002), *available at* http://www.ethics.org/releases/nr_20020318_enron.html.

126. ROSOFF ET AL., *supra* note 82, at 279–311 (describing the discovery of various corporate crimes and fraudulent schemes at Enron, Arthur Andersen, WorldCom, Global Crossing, Qwest Communications, Xerox, Adelphia, Tyco, Rite Aid, Halliburton, and Coca-Cola from 2001 to 2004).

127. *See, e.g.*, Press Release 2004-104, U.S. Sec. & Exch. Comm'n, SEC Charges Halliburton and Two Former Officers for Failure to Disclose a 1998 Change in Accounting Practice (Aug. 5, 2004), *available at* http://www.sec.gov/news/press/2004-104.htm; Press Release 2004-105, U.S. Sec. & Exch. Comm'n, Bristol-Myers Squibb Company Agrees to Pay $150 Million to Settle Fraud Charges (Aug. 4, 2004), *available at* http://www.sec.gov/news/press/2004-105.htm; Press Release 2004-103, U.S. Sec. & Exch. Comm'n, SEC and NYSE File Settled Action Charging Fidelity Brokerage Services for Violating Federal Securities Laws and NYSE Rules in Connection with Document Alteration and Destruction (Aug. 3, 2004), *available at* http://www.sec.gov/news/press/2004-103.htm (reporting that firm will pay $2 million in penalties); Press Release 2004-102, U.S. Sec. & Exch. Comm'n, Franklin Advisers to Pay $50 Million and Undertake Compliance Reforms to Settle Market Timing Charges (Aug. 2, 2004), *available at* http://www.sec.gov/news/press/2004-102.htm; Press Release 2004-99, U.S. Sec. & Exch. Comm'n, Settlement Reached with Two Specialist Firms for Violating Federal Securities Laws and NYSE Regulations (July 26, 2004), *available at* http://www.sec.gov/nes/press/2004-99.htm (reporting that the two firms will pay a total of $5.2 million in penalties and disgorgement, on top of the settlement for $241 million in penalties and disgorgement obtained from five other NYSE specialist firms in March 2004); Press Release CRM #470, U.S. Dep't of Justice, Former Enron Chairman and CEO Kenneth L. Lay Charged with Conspiracy, Fraud, False Statements (July 8, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/July/04_crm_470.htm; Eric Dash, *Bristol-Myers Agrees to Settle Accounting Case*, N.Y. TIMES, Aug. 5, 2004, at C1 (reporting that Bristol-Myers Squibb agreed to pay a $150 million penalty, one of the largest penalties ever imposed by the SEC for accounting fraud, and that the company had recently agreed to pay $300 million to settle a shareholder class-action lawsuit). As the poster child of corporate fraud, by

In response to the corporate accounting scandals sparked by Enron's filing for bankruptcy in December 2001[128] and stoked by news of WorldCom's $3.8 billion accounting restatement announced in June 2002,[129] the President's Corporate Task Force was created in July 2002.[130] Attorney General John Ashcroft touted the successes of that task force, announcing that in the nearly two years since its creation, more than 660 violators had been charged and "[o]ver 250

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midsummer of 2004, Enron-related fraud had yielded thirty-one defendants, including Kenneth Lay, former Enron chairman and CEO at the time Enron declared bankruptcy in December 2001. Edward Iwata, *Enron's Ken Lay: Cuffed but Confident*, USA TODAY, July 9, 2004, at 1B (reporting that "[t]he collapse of Enron in late 2001 led to billions in losses for investors and former employees, plus the largest bankruptcy restructuring in U.S. history at the time"). On the very day that Kenneth Lay appeared in court and was charged with conspiracy and fraud, Adelphia founder and CEO, John Rigas, and his son, Timothy Rigas, were convicted in a New York federal court of conspiracy, bank fraud, and securities fraud. *See* David Lieberman & Michael McCarthy, *Adelphia Founder, Son are Convicted*, USA TODAY, July 9, 2004, at 1B (reporting that the Rigases were alleged to have defrauded shareholders of $3.2 billion, and that the criminal convictions "could bolster Adelphia's civil lawsuit seeking at least $3 billion in damages from the defendants").

128. *See* Tammy Williamson, *Largest Bankruptcies*, CHI. SUN-TIMES, Dec. 9, 2002, at 8; *see also* PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOV'T AFFAIRS, THE ROLE OF THE BOARD OF DIRECTORS IN ENRON'S COLLAPSE, S. REP. NO. 107-70 (2002), *available at* http://www.news.findlaw.com/hdocs/docs/enron/senpsi70802rpt.pdf [hereinafter ROLE OF THE BOARD].

129. *See* John T. Bostelman, *Management Certifications, Sample Chapter from the Sarbanes-Oxley Deskbook*, PRACTISING LAW INST., 1369 PLI/Corp 557, 565 (2003); *see also* Gerald F. Seib & John Harwood, *Rising Anxiety: What Could Bring 1930s-Style Reform of U.S. Businesses?*, WALL ST. J., July 24, 2002, at A1 (reporting on public opinion polls showing that Americans want the President and Congress to focus on prosecuting corporate wrongdoers).

130. Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002) (ordering the Attorney General to immediately establish a Corporate Fraud Task Force within the DOJ for the purpose of coordinating efforts to detect, investigate, prosecute, and punish "those who perpetrate financial crimes . . ."); *see also* Press Release 02-388, U.S. Dep't of Justice, Attorney General Statement on Corporate Responsibility and the Creation of the Corporate Fraud Task Force (July 9, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/July/02_ag_388.htm. The creation of the presidential task force received a lukewarm response. Mike Allen, *Bush Urges Crackdown on Business Corruption; More Resources for Regulators, Increased Jail Terms Proposed*, WASH. POST, July 9, 2002, at A1. The order was watered down from initial proposals considered by the administration and notably weaker than the measure sponsored by Senate Banking Committee Chairman Paul S. Sarbanes, "who praised Bush's rhetoric but said there needs to be 'underlying substance as well if we're really going to address this problem.'" *Id.* Although some business groups praised Bush's plan, the Dow Jones industrial average dropped sharply after the speech and was down for the day by 171.81 points. *Id.* Three weeks later, in a frenzied effort to shore up market confidence, the Sarbanes-Oxley Act of 2002 was signed into law, as the financial markets continued to crumble in the wake of new accounting scandals. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 (Supp. 2002)); *see also* Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 361, 367 & n.45, 386–87 & n.140 (2003) [hereinafter Ramirez, *Just in Crime*] (describing the political maneuvering accompanying the passage of the Act).

[had]... been convicted or [had] pleaded guilty."[131] These numbers are not surprising given the ineffectiveness of gatekeepers and the notable increase in the discovery of managerial fraud, perhaps best illustrated by the dramatic increase in corporate earnings restatements in the late 1990s and through 2002.[132] Nevertheless, the numbers also suggest that the Organizational Sentencing Guidelines alone had fallen short of the goal of fostering the good corporate citizen.

2. Strengthening Compliance Programs and Improving Deterrence

Studies of the relationship between corporate compliance programs and corporate ethical behavior suggest that corporate efforts to implement compliance programs are aimed primarily at mitigating criminal liability rather than true corporate compliance with regulatory or statutory obligations and prohibitions.[133] Given the complex organizational structure of some corporate entities, external pressure to comply with programs can be easily decoupled from the internal pressures to perform within and for the benefit of the corporation.[134] Studies

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131. *See* John Ashcroft, Prepared Remarks on Indictment of Bernard J. Ebbers & Scott D. Sullivan (Mar. 2, 2004), *available at* http://www.usdoj.gov/archive/ag/speeches/2004/030204agweb.htm. This announcement includes individual as well as corporate violators. In fiscal year 2002, 252 cases were sentenced pursuant to the federal organizational sentencing guidelines. U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 95 n.1, tbl.51 [hereinafter U.S. SENTENCING COMM'N, 2002 SOURCEBOOK]. In fiscal year 2001, 238 cases were sentenced pursuant to the federal organizational sentencing guidelines. U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 95, tbl.51. In fiscal year 2000, 304 cases were sentenced pursuant to the federal organizational sentencing guidelines. U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 95 n.1, tbl.51. The number of individuals sentenced for corporate crimes is indeterminate because the Sourcebooks do not have a separate designation for such crimes committed by individuals. *See* Ramirez, *Just in Crime*, *supra* note 130, at 372 n.72 (describing the definitional quagmire of the term "white collar crime"). The Sentencing Commission's data collection on organizational sentencing has been criticized as deficient. *See* Cindy R. Alexander et al., *Evaluating Trends in Corporate Sentencings: How Reliable are the U.S. Sentencing Commission's Data?*, 13 FED. SENT. REP. 108, 108 (2000) (warning researchers that Sentencing Commission data on the sentencing of organizations is deficient because, among other reasons, a substantial number of cases are missing and large fines are underreported, but acknowledging the Commission's intention to revise its reporting practices). See generally U.S. SENTENCING COMM'N, ORGANIZATIONAL SENTENCING PRACTICES, http://www.ussc.gov/corp/organizsp.htm for access to the Sentencing Commission's data relevant to organizational sentencing from 1995 to 2003.

132. *See* John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 303–04, 310 (2004) [hereinafter Coffee, *Gatekeeper Failure*] (recognizing that while earnings restatements are characteristic of a market bubble, the rate of restatements suggested failure of the gatekeepers (auditors, security analysts, and securities attorneys) who seemed to "acquiesce[] in managerial fraud").

133. *See infra* note 196.

134. *See* Weaver et al., *supra* note 124, at 541, 550 (finding that executive commitment to responsible corporate behavior is primary to the integration of ethical practices in the corporate environment, and that responsibility for ethical performance

confirm that corporate compliance is enhanced when management commits to ethical conduct and integrates that commitment into employee performance evaluation.[135]

Ten years after the implementation of the Organizational Sentencing Guidelines, the Sentencing Commission formed an Ad Hoc Advisory Group to evaluate the Guidelines' effectiveness.[136] The Ad Hoc Advisory Group prepared a report in October 2003 that evaluated the existing Organizational Sentencing Guidelines, reviewed the regulatory responses to the recent corporate scandals, and proposed amendments and recommendations for change.[137] One key change the group recommended was to provide greater guidance regarding the factors that are likely to result in effective compliance programs.[138] The new criteria reflect the understandings gained by the Ad Hoc Advisory Group and include the following:[139]

1. Standards and procedures to prevent and detect criminal conduct;

2. Responsibility at all levels and adequate resources and authority for the program;

3. Personnel screening related to program goals;

4. Training at all levels;

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cannot be delegated or effectively communicated merely through widely distributed communiqués that can be easily decoupled from the daily conduct and decisionmaking of corporate employees). In this study of Fortune 1000 companies, the authors considered the effects of external pressures on corporations to adopt formal ethics programs and policies, including: the impact of the Organizational Sentencing Guidelines, which provide for credit to be given to corporations convicted of criminal misconduct that have adopted such policies; media pressure, which causes negative reaction to reports of misconduct or wrongdoing; and business "standard-setters," which influence corporate conduct by demonstrating or promoting good business practices. *Id.* at 541–43. The study also considered the internal pressure exerted by top management commitment to ethical conduct and promotion of ethical programs. *Id.* at 543. The authors' data showed that "external pressures only influenced easily decoupled ethics program practices." *Id.* at 549. That is, external pressures were more likely to result in ethics programs that were window dressing to deflect those pressures, but, because they had no real impact on daily performance or professional evaluation, they were not viewed by employees as high priority and were not included in employee performance. On the other hand, when ethical behavior was valued by top management and incorporated into the performance evaluation, high priority was given by the employee to ethical conduct, and such ethical conduct was internalized into the organizational conduct. *Id.* at 547–49.

135. *See* Weaver et al., *supra* note 124, at 547–50 (finding that when a compliance program is integrated into an employee's personal success, such as through performance evaluation, then it is given priority and integrated into employment decisionmaking so long as the decision to evaluate performance based upon ethical considerations was inspired by managerial commitment to ethical compliance and so long as retribution for poor performance was viewed as justly deserved rather than scapegoating).

136. U.S.S.C. REPORT, *supra* note 64, at 1.

137. *Id.* at i–iv.

138. *Id.* at 47–48; *see* U.S.S.G. § 8B2.1 (effective compliance and ethics program); Desio, *supra* note 119, at D-69.

139. *See* U.S.S.G. § 8B2.1; Desio, *supra* note 119, at D-69.

5. Auditing, monitoring, and evaluating program effectiveness;

6. Nonretaliatory internal reporting systems;

7. Incentives and discipline to promote compliance;

8. Reasonable steps to respond to and prevent further similar offenses upon detection of a violation.

The recommendation was based upon Congress's focus on corporate governance[140] in light of the recent corporate scandals, regulators' adoption of organizational compliance programs tailored to specific industries,[141] and industry progress in redefining "best practices" over the last decade.[142]

3. Preventing Corporate Crime Through Oversight

In addition to the revised Organizational Sentencing Guidelines, some corporations have responded to the corporate fraud scandal by recognizing the need for internal corporate governance oversight.[143] Governmental and regulatory authorities have responded to the corporate scandals with legislation and regulations[144] to address what was perceived to be the underlying causes of the scandals, to add transparency to companies' financial status, and to encourage responsible corporate conduct in the future.[145]

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140. The 2004 amendment to the Organizational Sentencing Guidelines is in part in response to Congress's directive to the Commission to review and amend the guidelines and related policy statement to ensure that they are sufficient to deter and punish organizational misconduct. *See* U.S.S.G. § 8B2.1 cmt. background; Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 805, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 (Supp. 2002)).

141. Since the Sentencing Commission established the corporate compliance criteria in 1991, several federal agencies have either explicitly or implicitly incorporated and improved upon these seven criteria in their compliance evaluation criteria. *See* U.S.S.C. REPORT, *supra* note 64, at 48–49 nn.188–94 (identifying some of those agencies as the DOJ, the HHS, the EPA, the SEC, the Occupational Safety and Health Administration, and the Department of the Treasury).

142. U.S.S.C. REPORT, *supra* note 64, at 48–49.

143. Some corporations have appointed positions with specific responsibility for overseeing the imposition of best practices. *See, e.g.*, Gaston F. Ceron, *Corporate Governance (A Special Report), Staying Focused: Corporate Governance May be Everybody's Responsibility; But at Some Companies, One Person has More Responsibility than Others*, WALL ST. J., Feb. 24, 2003, at R7. Although ideally all executives should promote good corporate governance, some companies have been more focused than others. *Id.* (reporting that Pfizer Inc. has had a corporate governance department for fifteen years); *see also* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 710 (2002).

144. Several of these legislative and regulatory responses are catalogued in U.S.S.C. REPORT, *supra* note 64, at 35–47.

145. The Sarbanes-Oxley Act of 2002 came on the heels of the 2001 Economic Crime Package ("ECP") of the U.S.S.C. Sentencing Guidelines. Sentencing Guidelines for U.S. Courts, 66 Fed. Reg. 30,512, 30,540 (June 6, 2001). The ECP extensively revised the sentencing guidelines structure for economic crimes resulting in tougher sentencing guidelines for *individuals* convicted of high-dollar economic crimes. *See* Ramirez, *Just in Crime*, *supra* note 130, at 380 (observing the substantial changes in the Sentencing

Congress responded with swift passage[146] of the Sarbanes-Oxley Act of 2002.[147] Among other things, the Sarbanes-Oxley Act included a certification requirement for the chief executive officer ("CEO") and chief financial officer ("CFO")[148] that was broader than a Securities and Exchange Commission ("SEC") rule issued in June 2002.[149] The Act further required the SEC to issue regulations "requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive officer of the company" and, if remedial measures are not forthcoming, "to report the evidence to the audit committee of the board of directors of the issuer or . . . to the board of directors."[150] The Act added whistle-blower protections for employees who aid in the investigation of certain criminal conduct.[151] Additionally, the SEC

Guidelines brought about by the ECP); *see also* Bowman, *supra* note 52, at 32–85 (reviewing the history behind the 2001 sentencing reform initiative, summarizing the most pertinent provisions of the reforms, and highlighting the most contentious areas of the reforms while addressing the rationale underlying their resolutions). The ECP went into effect on November 1, 2001, shortly after the Enron accounting scandal broke and a mere nine months before the Sarbanes-Oxley Act of 2002 was passed on July 30, 2002. Ramirez, *Just in Crime, supra* note 130, at 386, 388. The Sentencing Commission devoted six years to revising the Sentencing Guidelines. *Id.* at 376–77 n.92; Bowman, *supra* note 52, at 33–36. The Sarbanes-Oxley Act directed the Sentencing Commission to review and amend the Guidelines to "reflect the serious nature of the offenses and penalties set forth in this Act." Sarbanes-Oxley Act of 2002 §§ 902–904 (codified at 18 U.S.C. §§ 1341–1349 (Supp. 2002)) (enhancing maximum terms of imprisonment for some white-collar crimes); *id.* § 905 (codified at 28 U.S.C. § 994 (Supp. 2002)) (request to Sentencing Commission to review and amend); *id.* § 1104 (codified at 28 U.S.C. § 994 note (Supp. 2002)) (directive to Sentencing Commission to review and amend); *see also* Ramirez, *Just in Crime, supra* note 130, at 386–87 (describing portions of the Sarbanes-Oxley Act aimed at enhancing white-collar crime penalties and accountability for corporate fraud).

146. *See generally* David S. Hilzenrath et al., *How Congress Rode a "Storm" to Corporate Reform*, WASH. POST, July 28, 2002, at A1 (describing the swift passage of the Sarbanes-Oxley bill, which was made stronger on the Senate floor with new penalties for financial fraud). The bill passed in the House with a 423-3 vote, and the Senate approved it 99-0. Mike Allen, *Bush Signs Corporate Reforms Into Law; President Says Era of 'False Profits' Is Over*, WASH. POST, July 31, 2002, at A4.

147. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

148. *Id.* § 302 (providing that the CEO and CFO of every public company required to file financial statements with the SEC must certify that the statements "fairly present, in all material respects the financial condition and results of operations of the issuer"). Further, companion criminal provisions provide that executives who certify compliance knowing that such statements do not comply are subject to up to ten years imprisonment and up to twenty years imprisonment for willful violations. 18 U.S.C. § 1350(c) (Supp. 2002).

149. *See infra* note 215.

150. Sarbanes-Oxley Act of 2002 § 307. The SEC issued regulations in response to this mandate that identifies the appropriate components for an effective reporting system, including "up the ladder" reporting by attorneys. *See* 17 C.F.R. §§ 205.1–205.7 (2005). Compliance includes the requirement that an audit committee of independent board members be established and the prohibition barring the listing of any security of an issuer that fails to establish such a committee. *See* Sarbanes-Oxley Act of 2002 § 301.

151. *See* 18 U.S.C. § 1513(e) (Supp. 2002) (providing for criminal prosecution that is punishable by up to ten years imprisonment of anyone who "knowingly, with the

promulgated regulations,[152] as directed by the Act,[153] requiring publicly traded companies to either adopt a code of ethics or to report and explain the decision not to adopt such a code.[154]

The New York Stock Exchange ("NYSE") and the NASDAQ Stock Market have both revised corporate governance standards requiring codes of ethics that focus on the ethical conduct of the chief officers and boards of directors of listed companies.[155] As is the case for the new SEC rules, the NYSE new standards include lawful compliance[156] as but one aspect of good corporate governance, recognizing that "[n]o single set of guidelines would be appropriate for every . . . company, but certain key areas of universal importance include director qualifications and responsibilities, responsibilities of key board committees, and director compensation."[157] These efforts to legislate ethical conduct by corporate

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intent to retaliate, takes any action harmful to any person . . . for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense"); *id.* § 1514A (providing employees of publicly traded companies with a civil cause of action if they suffer retaliation as a result of providing information or assisting in the investigation of a fraud).

152. U.S. Sec. & Exch. Comm'n, Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 5110 (Jan. 31, 2003) (codified at 17 C.F.R. pts. 228, 229, 249 (2005)).

153. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

154. 17 C.F.R. § 228.406 (code of ethics); *id.* § 228.601 (exhibits); *id.* § 229.406 (code of ethics); *id.* § 229.601 (exhibits); *id.* § 249.308 (form 8-K for current reports). The code of ethics required by the SEC is intended to specify compliance with the law and set standards for ethical conduct by the key executives in publicly traded companies. *See* U.S.S.C. REPORT, *supra* note 64, at 39–40 (discussing the implications of the code of ethics as a shift from mere lawful compliance to ethical compliance, and placing the accountability for misconduct on the key executives in the company). While the choice remains with the company as to whether to adopt a code of ethics reflecting these standards, failure to adopt such standards may reflect poorly on the corporation as not living up to best practices, especially since the lack of an appropriate code of ethics must be reported annually to the SEC in publicly available filings. *See* 2 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 9.7 (4th ed. Supp. 2004).

155. *See* U.S. Sec. & Exch. Comm'n, Self-Regulatory Orgs., NYSE, Inc. & NASDAQ, Inc., Order Approving Proposed Rule Changes, 68 Fed. Reg. 64,154, 64,180 (Nov. 12, 2003) (describing NYSE and NASDAQ proposals at 68 Fed. Reg. 64,156 and in particular the NASDAQ Code of Business Conduct and Ethics at 64,164, as NASDAQ Rule 4350(n) and related Interpretive Material). Companies were required to comply with Rule 4350(n) within six months after the approval by the SEC, 68 Fed. Reg. 64,166 (compliance required by May 12, 2004). *See also* NYSE, Listed Co. Manual § 303A.10 (Nov. 4, 2003) (code of business conduct and ethics). The new ethical rules became effective for listed companies on the earlier of their first annual meeting after January 15, 2004, or October 31, 2004. *Id.* § 303A.00; Baker, *supra* note 23, at 331 n.136; 2 HAZEN, *supra* note 154, § 9.7[2], at 26–27.

156. *See, e.g.*, NYSE, Listed Co. Manual § 303A.10.

157. *Id.* § 303A.09. In the proposed rules, the NYSE recognized that companies and their boards would be expected "to apply the [new] requirements carefully and in good faith, making reasonable interpretations as necessary, and disclosing the interpretations that they make." NYSE BD. OF DIRS., CORPORATE GOVERNANCE RULE PROPOSALS, at n.2 (Aug. 1, 2002), *available at* http://www.nyse.com/pdfs/corp_gov_pro_b.pdf.

leaders are a more direct avenue than the good corporate citizen approach of the Organizational Sentencing Guidelines.

The above discussion surveyed the means by which organizations are held responsible for their misconduct and mistakes and are encouraged to not only comply with the law, but to seek out noncompliance within the organization and remedy the wrong committed. As the Ad Hoc Advisory Group's Report suggests, greater ethical guidance was needed. Although the requirements may enhance ethical conduct, Part II of this Article considers why these means are unlikely to achieve the good corporate citizen. Part III suggests one solution: rather than the "carrot and stick" approach of the Organizational Sentencing Guidelines, what is truly needed is a baseball bat.

II. FAILED DETERRENCE

With the many opportunities to address corporate malfeasance reviewed in Part I, one might question the need to add another layer of regulation on top of the already complicated legal landscape. Yet, corporate crime continues to grab headlines even as investors rush to gather the crumbs left behind from corporate pillaging. This Part considers underlying reasons for failed deterrence. Several factors appear to undercut deterrence: first, and perhaps foremost, there is an expectation that detection and prosecution is unlikely, and punishment will not be severe;[158] second, there is a corporate culture that ignores wrongdoing or fails to take responsibility for it;[159] third, there is an invincibility that accompanies the use of corporate legal and political influence to shape the law; and fourth, there is a governmental reluctance to harm the economy.

A. Lack of Detection or Substantial Punishment

An underlying premise of deterrence is the fear of punishment;[160] yet, larger corporations are rarely criminally prosecuted. The likelihood of being caught, criminally prosecuted, and convicted is extremely low.[161] Corporations recognize that the risk is low and factor that risk into the decision as to whether to break the law by applying a cost-benefit analysis.[162] The corporate decision is not

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158. *See infra* note 164.

159. *See infra* notes 171–72.

160. Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1707 (1992) ("[D]eterrence makes the most sense in situations where the likelihood of apprehension and punishment is high, or where the targeted population fears the prospective penalty and conforms its conduct accordingly.").

161. Indeed, only 252 federal criminal cases were sentenced under Chapter 8 (Sentencing of Organizations) out of the 64,366 federal criminal cases sentenced from October 1, 2001, through September 30, 2002. U.S. SENTENCING COMM'N, 2002 SOURCEBOOK, *supra* note 131, at 95 n.1, tbl.51; U.S. SENTENCING COMM'N, 2002 ANNUAL REPORT 40. Thus, even with stepped-up enforcement, the relative number of prosecutions is small.

162. Corporations routinely assess business choices by defining costs to the corporation of the choice in dollars and comparing that cost with the benefits to the corporation of that same choice, also defined in dollars. *Cf.* BAKAN, *supra* note 10, at 61–65 (describing the cost-benefit assessment General Motors undertook to compare the cost of

malicious; it is rational. If the purpose of the corporation is to maximize shareholder wealth, and the punishment for illegal conduct is a fine, then the rational approach is to calculate the likely gain in profits through increased revenue or cost-savings from committing the crime,[163] and then compare that to the likely fine discounted by the likelihood of the wrongdoing being discovered, successfully prosecuted, and sanctioned.[164] Once compared, if the cost of wrongdoing discounted by likelihood of discovery is less, then the rational choice is to commit the crime and pay the sanction if the crime is discovered.[165] If caught and convicted, a corporation that does not maintain large cash reserves might even assert that it cannot pay the fine,[166] thereby rendering superfluous the discount that the company might have received based upon a corporate compliance program.[167]

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installing a metal brace on its vehicles ($8.59 per vehicle for part and installment) against the likely cost per vehicle of lawsuits from customers and passengers killed or injured in fuel-fed fire fatalities ($2.40 per vehicle); in General Motor's case, the corporation reached the "rational" decision that it was substantially cheaper to pay damages awarded in lawsuits rather than to install the brace, considering the production of 41 million automobiles with braces). Judge Richard Posner has proposed that the optimal criminal sanction would be the cost of the crime multiplied by a factor representing the probability of apprehension and conviction. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 243–44 (5th ed. 1998). This theoretical calculation is not without its problems and must adjust for the decisionmaker's preference for risk. *Id.* at 244–45; *see also* Baucus & Baucus, *supra* note 21, at 131.

163. Cost savings can be measured not just in terms of dollars not spent but also in terms of who bears the cost. Externalities are costs borne by those other than the one who benefits from the conduct. *See* BAKAN, *supra* note 10, at 60–84 ("'An externality,' says economist Milton Friedman, 'is the effect of a transaction . . . on a third party who has not consented to or played any role in the carrying out of that transaction.'"). Damage to the environment through the illegal dumping of hazardous waste is borne by the persons and wildlife that become exposed to that waste. As Professor Bakan states: "Every cost [the corporation] can unload onto someone else is a benefit to itself, a direct route to profit." *Id.* at 73. Unless the corporation's act is discovered, and the corporation is ordered to clean up the hazard, the damage either remains or the government, using the tax dollars of its citizens (and foregoing alternative uses for those dollars), bears the cost.

164. Professor Coffee long ago labeled this as the "deterrence trap." Coffee, *No Soul to Damn*, *supra* note 11, at 389. Coffee explains that to deter a corporation, a fine must exceed the expected gain of the misconduct. Because any cost must be discounted by the likelihood of discovery and successful prosecution, the fine must be a multiple of the ill-gotten gain. If that fine exceeds the corporation's resources, the corporation can never pay the fine and will not, therefore, be adequately deterred by fines alone. *Id.* at 389–91. *See infra* note 166.

165. *See generally* POSNER, *supra* note 162, at 243 (citing Isaac Ehrilich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSPECTIVES 43, 55–63 (Winter 1996) (summarizing empirical studies on the rational choice model of criminal behavior); D.J. Pyle, *The Economic Approach to Crime and Punishment*, 6 J. INTERDISCIPLINARY ECON. 1, 4–8 (1995)).

166. Applying the Organizational Sentencing Guidelines, a court can depart from the recommended fine range if it would jeopardize continuing viability of the corporation. U.S.S.G. § 8C3.3 (reduction of fine based on inability to pay). *But see supra* note 70.

167. *See supra* notes 119–23; *cf.* United States v. Nathan, 188 F.3d 190, 213, 216 (3d Cir. 1999) (remanding sentencing of company, Electrodyne, to assess appropriate fine where district court departed upward from guidelines fine based upon underlying fraudulent conduct that was dismissed from indictment through a plea agreement, where Electrodyne

Under the Organizational Sentencing Guidelines, only criminal purpose organizations are subject to divestment of all their assets through criminal fines.[168] Other corporations are subject to a fine, but the fine is nearly always one that can be absorbed by the corporation.[169] The corporation that chooses to commit a crime plays a modified game of Russian Roulette, with no harm if the cartridge is blank (the crime is not discovered) and only a flesh wound if the bullet is fired (the crime is discovered, and a fine is levied). Because criminal deterrence for a corporation is limited to ability to pay if caught, criminally prosecuted, and convicted, it is only effective in those circumstances when the cost-benefit analysis of crime confirms that "crime does not pay."

B. Corporate Culture

Corporations and other enterprises face a multitude of factors that create an uncertain and complicated environment in which employees must navigate through the political, economic, socio-cultural, physical, and technological demands of regulators, employees, competitors, and the industry[170] while making a profit to satisfy shareholders. Larger corporations can diffuse the uncertainty and risk by creating a corporate structure that decouples the organization so that subsidiaries or independent contractors can take on some of that risk, or one that loosely couples the organization so that the decisions cannot be directly associated with a single actor or unit, thereby spreading the responsibility but limiting the risk to any one actor or group of actors.[171] In this manner, a parent company can indirectly promote wrongdoing by a subsidiary by encouraging certain results and benefit from that conduct while evading responsibility because it can disassociate itself from the misconduct.[172]

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argued inability to pay fine); United States v. Spanish Cove Sanitation, Inc., 91 F.3d 145, 1996 WL 366313, at *5–*6 (6th Cir. June 28, 1996) (unpublished decision) (remanding case for redetermination of criminal fine based upon company's inability to pay a $35,000 fine in a single payment).

168. Section 8C1.1 of the Sentencing Guidelines defines "criminal purpose organization" and provides that the fine imposed should be sufficient to divest an organization of net assets. *But see supra* note 70.

169. *See supra* note 54 (describing how offense levels and culpability scores are used to calculate criminal fine ranges for organizations in Chapter 8 of the Sentencing Guidelines); U.S.S.G. §§ 8C2.4, 8C2.6, 8C2.7. Given the size of some corporations, even very large fines may be absorbed. *See, e.g.*, *supra* note 87.

170. Carl Keane, *Loosely Coupled Systems and Unlawful Behaviour: Organization Theory and Corporate Crime*, *in* CORPORATE CRIME CONTEMPORARY DEBATES 168, 168–69 (Frank Pearce & Laureen Snider eds., 1995) (identifying external and internal factors faced by organizations, including political, socio-cultural, economic, physical, and technological factors, competition from other organizations, changing values of employees in the workplace, and greater government involvement in corporate life).

171. *Id.* at 172–75 (suggesting that a loose structuring of a large corporation may permit dysfunctional conduct that addresses risk through "decoupling" from those segments of its organization that may engage in misconduct so as to avoid liability).

172. For example, a parent corporation may place goals on production or limits on costs that are unrealistic in light of regulatory requirements, such as proper hazardous waste disposal. Even though the parent does not directly *require* wrongdoing, the manager

Because responsibility can be decoupled from risk, top managers can evade responsibility while outwardly promoting ethical conduct, such as developing codes of conduct, compliance standards and procedures, and periodic employee training programs.[173] Studies on legal compliance within organizations suggest executive ethical leadership strongly influences compliance.[174] Thus, while the studies support the underlying assumptions of the Organizational Sentencing Guidelines and the institutions overseeing financial markets regarding the need for

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believes the only way to meet goals is to cut costs by illegal conduct, such as improper hazardous waste disposal. If such conduct is discovered by regulators, the subsidiary, the manager of waste disposal, or even the employee who is personally responsible for dumping the waste may be blamed. Any sanctions fining the subsidiary are then calculated on the subsidiary's numbers, and market shame is limited to the subsidiary. Meanwhile, the parent company has reaped the profits of the illegal conduct, at least up to the point of sanction, but bears none of the risk. If the wrongdoing is never discovered, the parent corporation reaps profit without suffering any harm. Thus, under this decoupling theory, a parent corporation may retain actual control, but by decoupling the organization, such as using a subsidiary company or an independent contractor, liability for wrongdoing is limited to the actor—the subsidiary or independent contractor—and legal responsibility is evaded by the parent organization. *Id.*; *see also* Anthony J. Daboub et al., *Top Management Team Characteristics and Corporate Illegal Activity*, 20 ACAD. MGMT. REV. 138, 150 (1995) (citing M.D. ERMANN & R.J. LUNDMAN, CORPORATE AND GOVERNMENTAL DEVIANCE (3d ed. 1987)):

> [O]rganizations can produce deviance in at least three ways: (a) the structures of large organizations may limit the information and responsibility of position holders and thus reduce control; (b) organizational elites can indirectly initiate deviant actions by establishing particular norms, rewards, and punishments for members at lower levels; and (c) elites can consciously initiate deviant actions and use hierarchically linked positions to implement them.

173. *See supra* note 139.

174. *See, e.g.*, ETHICS RESOURCE CENTER, 2003 SURVEY, *supra* note 124 (reporting key finding that "[e]mployees who feel that top management acts ethically in four areas (talks about the importance of ethics, informs employees, keeps promises, and models ethical behavior), observe far less misconduct (15%) than those who feel top management only talks about ethics or exhibits none of these actions (56%)"); Linda Klebe Trevino et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 142 (1999) (study concluding that leadership is one of the most important factors in explaining the ethical culture of an organization). The study noted a high correlation between employees' perceptions of supervisors and executives. Indeed, because employees tend to have more frequent contact with supervisors, supervisors are looked to for leadership, for rewards and punishments, and for carrying the inside message of management to employees as to how things really are to be done. *Id.* at 141–42. "[I]f executive leaders value and pay attention to ethics, so do supervisory leaders. . . . Where employees perceived that supervisors and executives regularly pay attention to ethics, take ethics seriously, and care about ethics and values as much as the bottom line, all of the outcomes were significantly more positive." *Id.* at 142. *But see* DIANE VAUGHAN, CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR: SOCIAL STRUCTURE AND CORPORATE MISCONDUCT 68–76 (1983) (positing that for larger corporations, size and structure creates "authority leakage" whereby top management is unable to control middle-management overseeing subunits, and that competition for corporate resources further acts as an impetus for middle-managers to engage in illegal conduct without the authority or knowledge of top management).

good corporate citizenship,[175] ethical leadership in an organization must be sincere and must come from the top.[176] Further, when corporate leaders foster self-interest over ethical conduct, such leadership undermines ethical compliance within the corporation.[177] There is little one can do to reshape the ethical foundations of a leader who has reached the height of a corporate executive. If ethical leadership cannot be imposed through the use of guidelines, then perhaps the better approach is to create the incentive to lead.

C. Legal and Political Influence

The threat of civil lawsuits and the unpredictability of litigation also contribute to the uncertain environment of the corporation. Corporations address this uncertainty by using their resources to minimize the risks that litigation poses to fulfilling the profit-making duty owed to shareholders.[178] Therefore, corporate

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175. *Supra* sources cited note 174. The goal of the Sentencing Commission was to create an ethical environment, but the means used has been criticized. *Cf.* Weaver et al., *supra* note 124.

176. One study shows that although environmental variables (Sentencing Guidelines awareness, media attention, and Ethics Conference Board representation) positively influenced the scope of corporate ethics compliance programs, top management's commitment to ethics "has a stronger influence on the control orientation of ethics programs." Gary R. Weaver et al., *Corporate Ethics Programs as Control Systems: Influences of Executive Commitment and Environmental Factors*, 42 ACAD. MGMT. J. 41, 53 (1999).

177. Unethical culture is most likely to emerge where there is "an expectation of unquestioning obedience to authority," and where employees perceive that the focus of the organization is one of "self-interest rather than concern for employees and/or the community." Trevino et al., *supra* note 174, at 144. This is borne out by anecdotal reports of the corporate environments of some recent corporate fraud cases. For example, because Jeffrey Skilling, as CEO of Enron, encouraged an aggressive and cutthroat culture where employees could not trust each other, "Enron became a place where mistakes were never made—or, rather, never acknowledged." ROSOFF ET AL., *supra* note 82, at 290. "They roll you over and slit your throat and watch your eyes while you bleed to death." Mimi Swartz, *How Enron Blew It*, TEX. MONTHLY, Nov. 2001, at 138, 175. An ex-executive at Dynegy Corporation filed suit against Dynegy seeking retaliation damages after he rebuffed pressure by the president and chief operating officer, Stephen W. Bergstrom, and the CFO, Robert D. Doty Jr., "to alter the company's accounting standards so as to hide energy trading losses and bolster profits." David Barboza, *Ex-Executive Says Dynegy Asked His Help to Cook Books*, N.Y. TIMES, Aug. 5, 2002, at C1. On September 24, 2002, Dynegy settled an enforcement action by the SEC in connection with accounting improprieties and misleading disclosures, among other misconduct, agreeing to a $3 million civil penalty. Press Release 2002-140, U.S. Sec. & Exch. Comm'n, Dynegy Settles Securities Fraud Charges Involving SPEs, Round-Trip Energy Trades (Sept. 24, 2002), *available at* http://www.sec.gov/news/press/2002-140.htm; *see also* Gardiner Harris, *Booster Shots: At Bristol-Myers, Ex-Executives Tell of Numbers Games*, WALL ST. J., Dec. 12, 2002, at A1, A13 (stating that CEO created an environment where "you make your numbers at all costs").

178. Noted economist Milton Friedman identifies the single corporate goal: make as much money as possible for the shareholders. *See* BAKAN, *supra* note 10, at 33–34 (interview with Milton Friedman); Friedman, *supra* note 9. Friedman limits corporate social responsibility to those instances when it is used solely as a means to maximize shareholders' wealth. BAKAN, *supra* note 10, at 34.

lawyers argue for favorable legal interpretations protecting corporate interests.[179] Moreover, corporations financially support political campaigns[180] to yield special access to the political process.[181] Finally, corporations act individually through

179. For example, corporations are permitted to use the extensive financial resources of the corporation to support political initiatives under the umbrella of free speech. *See* Boston v. Bellotti, 435 U.S. 765, 777 (1979) (implying corporation's right to political speech under the First Amendment in overturning a Massachusetts criminal statute prohibiting a corporation from contributing money to support or oppose political referenda not materially related to or affecting that corporation). The U.S. Supreme Court has also repeatedly held corporations are protected under the Fourteenth Amendment's Due Process and Equal Protection clauses. *See* Minneapolis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889) (implicitly finding that the due process clause of the Fourteenth Amendment applies to corporations); Santa Clara Co. v. So. Pac. R.R., 118 U.S. 394, 396 (1886) (prior to oral argument, and despite briefing by both parties on the issue in light of the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873) (recognizing that the purpose of the Fourteenth Amendment was to protect human rights), the Court stated that it did not wish to hear argument on the application of the Fourteenth Amendment Equal Protection Clause's applicability to the case because they were "all of the opinion that it does [apply]"); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (finding state violated Contracts Clause of Article I when it revoked the corporate charter of Dartmouth College). "In 1938, Justice Hugo Black noted that, of all the cases in which the Supreme Court applied the Fourteenth Amendment in the half-century following *Santa Clara*, 'less than one-half of 1 percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations.'" KELLY, *supra* note 4, at 163. "The *Dartmouth College* case, 4 Wheat. 518, 4 L. Ed. 629, and the construction given the Fourteenth Amendment in the *Santa Clara* case 'have had the effect of placing the modern industrial corporation in an almost impregnable constitutional position.'" Wheeling Steel Corp. v. Glander, 337 U.S. 562, 578 n.1 (1949) (Douglas, J., dissenting) (quoting Arthur Twining Hadley, *The Constitutional Position of Property in America*, 64 INDEPENDENT 834, 836 (1908)). In addition to co-opting the Fourteenth Amendment, corporations successfully pressed decisions favoring the corporate structure in the courts' interpretation of the commerce clause, which opened up the state borders to free trade for big business. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 397–99 (3d ed. 2005).

180. Sometimes the expectations are directly conveyed: *USA Today* reported that in the course of lobbying for his vote in support of a Medicare prescription drug benefit passed by Congress in November 2003, Michigan Republican Congressman Nick Smith told Gannett New Service on November 24, 2003, that he "had received promises that business interests and GOP leaders would help his son's campaign [for Congress] in exchange. He said he also was told those same groups would work to defeat his son if Smith voted against the bill." William M. Welch & Andrea Stone, *Dems Want Inquiry into Reports of Medicare Bribe*, USA TODAY, Dec. 5, 2003, at 7A. Other times the expectations are implied. *See, e.g.*, Press Release, Corporate Crime Reporter, Corporate Criminal Donations to the Two Major Parties (July 3, 2003), *available at* http://www.corporatecrimereporter.com/07_02_03_pressrelease.html (reporting that in the 2002 election cycle, from January 1, 2001 to December 31, 2002, 31 of 120 major corporations convicted of crimes since 1990 gave a total of $9.3 million to the Democratic and Republican Parties).

181. *See, e.g.*, Don Van Natta Jr. & Neela Banerjee, *Bush Energy Paper Followed Industry Path*, N.Y. TIMES, Mar. 27, 2002, at A20 (reporting that according to documents released by the U.S. Energy Department, Energy Secretary Spencer Abraham met with energy industry executives, trade association leaders, and lobbyists, but declined to meet with any representatives of environmental organizations or consumer groups, citing a busy

lobbyists[182] or collectively through trade associations,[183] combining resources to elect probusiness political representatives and to influence favorable legislation and rulemaking euphemistically termed "civil justice reform."[184]

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schedule). "Many of the executives were leaders of corporations that were among the most generous financial supporters of President Bush's presidential campaign and the Republican Party . . . [with] 18 contribut[ing] a total of $16.6 million to the Republican Party since 1999, nearly three times what they gave to the Democratic Party, according to an analysis of data compiled by the Center for Responsive Politics." *Id.*; *see also* WATKINS ET AL., *supra* note 85, at 74–85 (suggesting corporate establishment of Political Action Committees ("PACs") and the use of "soft money" political contributions are a good investment, given anecdotal evidence). The authors note that a downside to such political contributions is that some corporate executives "complain about constant pressure from legislators to contribute to their reelection campaigns. Some have complained that the requests amount to virtual extortion, especially when they come from officeholders that can affect the company's well being." *Id.* at 76; *see also, e.g.*, BAKAN, *supra* note 10, at 104–05 (citing a letter from Jim Nicholson, chairman of the GOP at the time, to the CEO of Bristol-Myers-Squibb, seeking a $250,000 donation and reminding the CEO of the need to "keep the lines of communication open if we want to keep passing legislation that will benefit your industry").

182. Corporations and trade organizations hire lobbyists to obtain favorable legislation or kill unfavorable proposed legislation that could harm the corporate interests in the form of higher costs or lower sales. *See* BAKAN, *supra* note 10, at 102–07 (recognizing the corporate view that since the mandate of the corporation is to maximize shareholder wealth, the investment of corporate funds to influence the political process and promote corporate-friendly legislation is a justifiable business expense). The corporate financial interests, however, are often at odds with the health and safety interests of humans. *See id.* at 98–102, 104–05 (citing examples of corporate support for political campaigns). Thus, corporate interests often propose or at least support legislation with a strong likelihood of detrimental health effects. *See, e.g.*, Jennifer Lee, *EPA Proposes Easing Rules on Mercury*, INT'L HERALD TRIB., Dec. 4, 2003, at 7 (reporting that the EPA administrator proposed removing mercury emissions from the "most stringent regulations of the Clean Air Act" after regulation of mercury emissions had been the subject of intense lobbying by utilities arguing the rules would force them to "switch to more expensive fuels or install costly equipment on power plants to reduce the amount of mercury being spewed into the air"); Anahad O'Connor, *Proposed Mercury Warning Includes Tuna*, INT'L HERALD TRIB., Dec. 13, 2003, at 9 (reporting that the U.S. government, in an updated draft advisory, is cautioning children and pregnant women to limit consumption of tuna, in addition to avoiding shark, swordfish, king mackerel, and tilefish altogether, "because they contain levels of mercury that can damage the developing nervous system"). In November 2003, the enforcement arm of the EPA decided to "stop pursuing Clean Air Act enforcement cases" against coal-burning power plants. *Id.*; *see also* ROSOFF ET AL., *supra* note 9, at 58–59; Desda Moss, *Ex-Tobacco Lobbyist Tried to "Undo Damage,"* USA TODAY, Mar. 5, 1996, at 7A (reporting that former lobbyist for the Tobacco Institute died of throat cancer, having expressed "tremendous remorse" for his role in promoting smoking, and quoting deceased's wife as stating, "He realized that it was wrong, that you don't market death").

183. *See* William Lamb, *Edwards' Career Puts Focus on Tort Reform*, ST. LOUIS POST-DISPATCH, Jul. 11, 2004 (quoting trade associations leaders' views that 2004 vice-presidential candidate John Edwards, a trial attorney, would disfavor tort reform initiatives, and that therefore, the associations would redouble efforts to support President George W. Bush in his bid for reelection).

184. The American Tort Reform Association ("ATRA"), founded in 1986, is a nonpartisan "nationwide network of state-based liability reform coalitions" whose agenda includes healthcare liability reform, class action reform, abolition of the rule of joint and

Civil justice reform initiatives are broad-ranging.[185] The corporation's successful lobbying efforts are evident in the carefully drafted rules of procedure limiting access to courts through narrowed statutes of limitations, limitations on standing to sue, higher standards of intent for fraud,[186] expanded rights of removal to federal courts for securities fraud litigation[187] and class actions,[188] limited civil

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several liability, abolition of the collateral source rule, limits on punitive damages, limits on noneconomic damages, and production liability reform. Am. Tort Reform Ass'n, About Us, http://www.atra.org/about/ (last visited Oct. 25, 2005). ATRA maintains a webpage that catalogues "state civil justice reforms" by state. Am. Tort Reform Ass'n, State Civil Justice Reforms, http://www.atra.org/states/ (last visited Oct. 25, 2005). The web page provides a map of the United States and, upon clicking on the individual state, a list of civil justice reform laws for that state from at least 1986 to the present.

185. Corporations may actually prefer criminal remedies, such as the Sarbanes-Oxley Act of 2002, to civil remedies because of lower expected costs. *See* Khanna, *supra* note 74, at 31. Reasons for such a preference include: weak enforcement of corporate criminal laws; the ability of corporate lobbyists to influence the level of enforcement through advocating reduced budgets to legislators (versus civil liability, which may be enforced through government agencies *and* private litigants); the risk of greater penalties through civil liability due to punitive damages awards; less frivolous and more targeted cases because private parties are more likely to file frivolous suits than the government; and less financial risk to third parties, such as accountants, attorneys, and underwriters because of mens rea requirements in criminal cases. *Id.* at 32–34. Even when corporate interests cannot entirely deflect anticorporate legislation, Professor Khanna suggests that such legislation can be channeled; thus, "[c]orporate opposition to Sarbanes-Oxley was considerably less intense than opposition to moves to enhance corporate civil liability through repeal of the PSLRA." *Id.* at 32. Indeed, lobbying efforts were successful in halting the repeal of the PSLRA. *Id.*; *see* Ramirez, *Arbitration and Reform*, *supra* note 76, at 1072–84 (criticizing measures diminishing private civil remedies under the PSLRA in light of rampant financial market fraud); Ramirez, *Just in Crime*, *supra* note 130, at 403–04; *infra* text accompanying notes 234–38; *see also* Steven A. Ramirez, *Fear & Social Capitalism: The Law and Macroeconomics of Investor Confidence*, 42 WASHBURN L.J. 31, 65 (2002) (noting that the Sarbanes-Oxley Act of 2002 did not materially expand civil remedies for corporate fraud).

186. Rule 9 of the Federal Rules of Civil Procedure requires a higher standard to plead fraud than is required for other civil claims. The specificity of a plaintiff's allegations of fraud has been increased so that plaintiffs must virtually prove the facts of the case before being permitted to obtain discovery to support such facts. No other area of federal civil litigation requires this level of specificity in the pleadings, even in light of the already difficult nature of proving fraud, given the state of mind requirements. *See also supra* note 76.

187. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 101, 112 Stat. 3227 (amending scattered sections of 15 U.S.C. §§ 77–78) (precluding state court securities litigation involving publicly traded companies by requiring such suits be brought in federal court); Ramirez, *Depoliticizing*, *supra* note 76, at 533 (discussing the effects of enacting the Uniform Act).

188. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4 (codified at 28 U.S.C.A. §§ 1711–1715, 1453 (West 2005)) (providing for removal of interstate class action lawsuits to federal court).

liability, and damages caps.[189] In each of these examples, the rights of individual plaintiffs have been narrowed while the protection of the corporate defendant has been expanded. Yet, as opportunity to deter corporate wrongdoing through civil litigation[190] is narrowed, and in some cases eliminated, the government must step in through administrative or criminal law to protect the public that is denied the means to protect itself.[191]

D. Legislative and Executive Reluctance

Politicians balance desire for a robust economy driven by enterprise with concern for the detrimental cost of crime. Legislators support corporate interests to

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189. *See supra* note 184; ATLA in Motion, *Vetoes and Voters Stem the Tort 'Reform' Tide*, TRIAL, Jan. 2005, at 11 (reviewing state tort reform efforts in 2003–2004 legislative sessions); Marshall & Fitzgerald, *supra* note 80, at 238 ("The tort reform movement has influenced a number of procedural and substantive legislative changes addressing such issues as standing, standards of proof, and damage limits or caps, all of which have placed constraints on the judicial administration of tort claims."); Bruce Moyer, *New Congress Set to Consider Legal Reforms*, 52 FED. LAW. 8, Jan. 2005 (reporting that the 109th Congress plans to revive or modify several reform bills that failed the previous year, including imposing caps on medical malpractice damages).

190. *See supra* notes 80–81 (discussing the risk of liability in parallel civil administrative proceedings and in private civil litigation as a deterrent to wrongdoing); *see also* Marshall & Fitzgerald, *supra* note 80. In assessing the impact of legislative tort reform and the Supreme Court's rulings limiting punitive damages on due process grounds (finding that civil punitive damages are akin to criminal punishment) on corporate wrongdoing, Professors Marshal and Fitzgerald conclude the changes undercut deterrence:

> In summary, the rational actor model that drives fundamental microeconomic theory upon which the success of our large commercial republic thrives, demonstrates that the imposition of punitive damages requires a firm to internalize the cost of production associated with reprehensible conduct. Punitive damages increases the price of reprehensible input activities that results in a rational firm decreasing its use of reprehensible input activities . . . and increasing its use of reasonable input activities . . . .

Id. at 255–56. This analysis was extended to other tort-reform measures: "To the extent . . . statutory caps operate to distort the price tortfeasors must pay to engage in negligent conduct, such caps will result in inefficient judicial outcomes. Statutory damage caps essentially fix the maximum price a tortfeasor must pay to engage in negligent activity." *Id.* at 258.

191. The difficulty with relying upon agency regulation is that the agency may be influenced by the same forces that alter statutory regulation. *See, e.g.*, Christopher Lee, *Senators Question Relocation Payments*, WASH. POST, July 27, 2004, at A17 (reporting that a proposed change in federal reimbursement regulations supported by industry groups, including the Aerospace Industries Association and the National Defense Industrial Association, and opposed by the Defense Contract Audit Agency and the Department of Defense ("DOD") Inspector General, would likely increase costs to taxpayers and make audits of private contractors to the DOD and the National Aeronautics and Space Administration more difficult, while resulting in more favorable treatment for private contractors as distinguished from federal employees); *see also* Ramirez, *Depoliticizing*, *supra* note 76, at 562 n.356 (describing the SEC's reversal of position opposing private securities litigation reform after "[s]enators 'threatened to turn out the lights' at the SEC").

retain employment opportunities for constituents, collect tax revenues,[192] and maintain a dynamic marketplace.[193] The U.S. Department of Justice considers the impact on innocent victims, such as employees of a corporation, in determining whether to charge a corporation with a crime.[194] The Sentencing Commission likewise has focused as much attention on encouraging lawful compliance as it has

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192. Friedman describes the battles among the states in the latter half of the nineteenth century to entice corporations to abandon other states and charter within their borders. FRIEDMAN, *supra* note 1, at 522–25. While each state retained the right to govern business to the extent such right had not been preempted by federal law, states interested in jobs and corporate franchise fees competed against each other, offering favorable corporate legislation to attract corporate incorporations. *Id.*; *see also* GEVURTZ, *supra* note 5, at 22–23 (explaining that as economic concentration in corporations gained desirability, states competed against each other to attract the corporations and the economic prosperity they offered by permitting corporations to broaden corporate statements of purpose from specific quasi-public functions, such as providing transportation, to broadly worded purposes, such as "any lawful business"). This competition was detailed by Justice Brandeis in his dissent in Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933): "[C]ompanies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive. . . . The race was one not of diligence but of laxity." *Id.* at 558–59 (Brandeis, J., dissenting in part). In a footnote, Justice Brandeis quoted the preface, written by Delaware's Secretary of State in its 1901 official pamphlet containing its corporation laws: "'It is believed that no state has on its statute books more complete and liberal laws than these.'" *Id.* at 559 n.36. The competition for corporate chartering revenue through lax legislation came to be known as the "race for the bottom." *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 666 (1974); *see also* Ramirez, *Depoliticizing*, *supra* note 76, at 571–72 (suggesting that if securities markets operated efficiently, then investors would seek out corporations that protected their interests, and corporations would lose market share if they chose inferior state law governance schemes, but recognizing that corporations continue to reincorporate in Delaware, a state with laws that favor the corporate decisionmakers to the detriment of investors, without any loss in market value). One suggestion to address the race to the bottom approach taken by states in adopting legislation to lure corporate managers to their borders is the idea of federal corporate chartering that would nationalize the rules. RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE CORPORATE GIANT: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS (1976) (assessing the pros and cons of federal chartering of corporations engaged in interstate commerce with high domestic sales or at least 10,000 employees).

193. *See, e.g.*, Richard A. Oppel Jr., *Enron's Many Strands: Retirement Money; In Enron's Wake, Pension Measure Offers Loopholes*, N. Y. TIMES, Apr. 10, 2002, at A1 (reporting that legislation intended to mend holes in the pension benefits safety net actually weakens existing employee protections with a provision "championed by business interests" and favors highly paid workers over low- and mid-paid employees). The report recognizes the tension between business interests and pension-rights groups. Lawmakers seek to permit businesses more flexibility in administering pension plans and in receiving favorable tax treatment associated with the plans while creating incentive for smaller companies to continue to offer such plans by avoiding stringent governmental requirements. *Id.*

194. At least for charging decisions in federal criminal prosecutions, "[p]rosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense," including impact on innocent shareholders and employees. Thompson Memorandum, *supra* note 107, at IX.

on creating a sound organizational sentencing structure.[195] Nevertheless, studies of the relationship between corporate compliance programs and corporate ethical behavior suggest that corporate efforts to implement compliance programs are aimed primarily at mitigating criminal liability rather than true corporate compliance with regulatory or statutory obligations and prohibitions.[196] Although the Sentencing Commission recently implemented changes to address cosmetic compliance, this "carrot and stick" approach has been ineffective thus far.

III. THE CORPORATE DEATH PENALTY ACT

As Parts I and II illustrate, laws already exist to sanction corporate misconduct. Moreover, there are mechanisms, such as fines amounting to the entire net assets of a corporation, that are akin to a corporate death penalty. Nevertheless, these sanctions are insufficient to stem continued corporate criminality by expansive organizational entities, in part because they are not well suited to address misconduct by management of a publicly held company. Additionally, concern about the greater economic impact of imposing criminal sanctions on the organization has neutralized the State's will to fully prosecute criminal conduct.[197] In this Part, I propose a Corporate Death Penalty Act ("CDPA"),[198] which incorporates a graduated sanction approach to organizational

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195. *See supra* notes 136–40 and accompanying text.

196. *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 510 (2003) (contending that empirical evidence suggests that neither ethics codes nor the Organizational Sentencing Guidelines compliance programs are effective mechanisms for deterring "socially undesirable conduct within organizations"). Krawiec considered three large-scale studies that systematically tested the assumption of the Guidelines' Good Corporate Citizen recommendations. *Id.* at 512–15; *see also* M. Cash Mathews, *Codes of Ethics: Organizational Behavior and Misbehavior*, *in* RESEARCH IN CORPORATE SOCIAL PERFORMANCE AND POLICY 107, 126 (William C. Frederick & Lee E. Preston eds., 1987) (finding the relationship between corporate codes of conduct and corporate violations to be "minimal"); Marie McKendall et al., *Ethical Compliance Programs and Corporate Illegality: Testing the Assumptions of the Corporate Sentencing Guidelines*, 37 J. BUS. ETHICS 367, 376–79 (2002); Marie McKendall & John A. Wegner, III, *Motive, Opportunity, Choice, and Corporate Illegality*, 8 ORG. SCI. 624 (1997); Trevino et al., *supra* note 174, at 131, 137–38 (finding that a values orientation is the most effective ethics orientation for an organization but that a compliance orientation is also positive, even if not as strong as the values orientation). In one study, the researcher found higher rates of regulatory violations in corporations with codes of conduct, reflecting corporate concern for reputation. Mathews, *supra*, at 125–26. Some scholars questioned the wisdom of the Sentencing Commission's compliance program from its inception. *See* Parker, *Rules Without*, *supra* note 12, at 418 (criticizing the Organizational Sentencing Guidelines for attempting "to force the creation of a compliance bureaucracy throughout corporate America").

197. *See supra* Part II.D.

198. Elements of California's failed Corporate Three Strikes legislative proposal in 2003 are drawn upon in this Article. *See* S. 335, 2003 Leg., 2003-2004 Sess. (Cal. 2003) (as amended by Senate, June 2, 2003); *Corporate Three Strikes Act: Hearing on SB 335 Before the Appropriations Committee*, 2003 Leg., 2003-2004 Reg. Sess. (Cal. 2003) [hereinafter *Corporate Three Strikes Act*] (noting that California S.B. 335 failed passage on May 29, 2003, on a vote of 6-6). Although reconsideration on the bill was granted on May 29, 2003, the bill failed on a 6-5 vote in the Senate Appropriations Committee on June 4,

misconduct that is intended to spur action rectifying internal corporate misconduct. Subpart A outlines the parameters of the proposed CDPA. Subpart B defines key elements of the proposal, considering potential legal challenges to the rule and identifying additional questions for later resolution. Finally, Subpart C considers potential costs and benefits of the proposed CDPA.

A. The Proposal

The key premise of the CDPA is that an entity subject to it could be involuntarily dissolved if the entity incurs three or more strikes for substantial violations of law as defined by the CDPA.[199] Just as a foul ball in baseball may be counted as a strike, this approach permits negotiated civil settlements for some misconduct to be counted as strikes.[200] The third strike must be a pure strike; that is, it must be a serious violation of criminal law. This approach maximizes opportunities for remediation prior to the ultimate penalty of involuntary dissolution and assures that this penalty is finally triggered only upon serious criminal conduct.

The CDPA is an additional penalty that may be imposed on a corporation in a graduated punishment scheme. Because the third strike is earned only through committing a serious criminal offense, penalties such as those provided in the Organizational Sentencing Guidelines, including restitution, fines, and corporate probation, would continue to be imposed.[201] The basic approach is that, in order to minimize collateral economic damage, violations must be the last resort.

Once the CDPA is adopted as either federal or state law, strike violations by corporations incorporated or authorized to transact business in the state would be reported to the appropriate government authority,[202] which would maintain a publicly available log of the strikes.[203] In addition to the mandatory reporting requirement, the entity would be required to include strike information in its

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2003. S. 335, 2003 Leg., 2003-2004 Sess., Complete Bill History (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0301-0350/sb_335_bill_20030604_history.html.

199. See *infra* Part III.B.3 for a detailed definition of "strike" under the CDPA.

200. In professional baseball, strikes may be called: (1) for failing to swing the bat and hit the ball when the ball is pitched into the strike zone; (2) for swinging the bat and missing the ball pitched to the batter; or (3) for swinging the bat and hitting the ball into the foul zone, but only if the batter has earned fewer than two strikes during that turn at bat. Once the batter has earned two strikes during his turn at bat, all balls hit into the foul zone are deemed "foul" balls. MLB.com, Official Rules, Rules 2.00, 6.00, *available at* http://mlb.mlb.com/NASApp/mlb/mlb/official_info/official_rules/definition_terms_2.jsp (last visited Oct. 20, 2005).

201. *See supra* notes 54–62 (discussing sentencing under the Sentencing Guidelines).

202. The prosecutor or, in the case of a negotiated strike, the government agent representing the state's interest would be responsible for reporting the strike to the Secretary of State. If the CDPA were federally adopted, the DOJ rather than the Secretary of State would maintain the log. *See* Cal. S. 335, tit. 6, § 40005(a) (requiring reporting of strikes to Secretary of State).

203. *See* Cal. S. 335, tit. 6, § 40005(b) (requiring the Secretary of State to maintain a public website and retain strike information for ten years).

financial statements and disclosure filings,[204] and to publicize the strike through advertisements in broadly circulated newspapers likely to be viewed by investors and customers.[205] Wide public disclosure of information relating to strikes would serve to alert innocent investors to the speculative risk created by the possibility of involuntary dissolution and the economic disruptions attendant to such a dissolution.

Once a corporation is sentenced to three strikes, the appropriate government official would dissolve the corporation by revoking its charter. A receiver or trustee would be appointed to oversee the dissolution of the corporation.[206] In instances of dissolution, the CDPA could generally draw from

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204. Naturally, a strike would be deemed material in that a strike would trigger the mandatory disclosure regime applicable to public companies under the federal securities laws. *See* 15 U.S.C § 78m(a)(2) (2000) (requiring public companies to file periodic reports annually and quarterly); 17 C.F.R. § 240.12b-20 (2005) (requiring full disclosure of all material facts in periodic reports). In addition, publicly held companies are required to disclose all material facts when they solicit proxy votes in connection with an annual meeting to elect directors and for other shareholder votes. 17 C.F.R. § 240.14a-9; *see also* MARC I. STEINBERG, UNDERSTANDING SECURITIES LAWS § 10.07 (1996) ("The periodic reports that issuers are required to file under the Exchange Act are comprehensive, and one generally cannot omit material bad news without violating the securities laws."). A fact is material under the federal securities laws if the fact is one a "reasonable shareholder would . . . consider . . . important." TSC Indus., Inc. v. Northway, 426 U.S. 438, 439 (1976). In addition, the SEC routinely uses its administrative authority to issue interpretive guidance regarding specific materiality issues. *See* SEC Comment on Timely Disclosure of Material Corporate Developments, Release Nos. 33-5092, 34-8995 (Oct. 28, 1970). In the past, it has deemed facts relating to specific developments to be material, and it could do so with respect to strikes under the CDPA. *See, e.g.*, Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences, Release Nos. 33-7558, 34-40277 (July 29, 1998), *available at* http://www.sec.gov/rules/interp/33-7558.htm.

205. *See* Cal. S. 335, tit. 6, § 40008 (requiring publication of the details of the offense after a first strike "in a full page statement in the largest newspaper of general circulation in California," and "in the six largest newspapers of general circulation in California" after a second strike); *cf.* U.S.S.G. § 8B1.4 (order of notice to victims—organizations); *id.* § 5F1.4 cmt. background (order of notice to victims):

> In cases where a defendant has been convicted of an offense involving fraud or "other intentionally deceptive practices," the court may order the defendant to "give reasonable notice and explanation of the conviction, in such form as the court may approve" to the victims of the offense. 18 U.S.C. § 3555. The court may order the notice to be given by mail, by advertising in specific areas or through specific media, or by other appropriate means. . . . The court may not require the defendant to pay more than $20,000 to give notice.

206. Traditionally receivers or trustees are fiduciaries charged with obligations of care and loyalty to preserve property and administer assets with a view toward protecting stakeholders, such as creditors and shareholders. *See* BLACK'S LAW DICTIONARY 1296, 1553 (8th ed. 2004). The Sentencing Guidelines provide for the appointment of a master or trustee to ensure an organization's compliance with court orders for conditions of probation in the event of repeated, serious violations of probation conditions. U.S.S.G. § 8F1.1 cmt. n.1 (violation of conditions of probation). Trustees could be appointed and/or elected in a manner similar to trustee appointment or election under federal bankruptcy law. *See, e.g.*, 11 U.S.C. § 701 (2000) (appointment of interim trustee for liquidation of assets); *id.* § 702

the jurisdiction's corporate laws that govern the winding up of the corporation.[207] Even though dissolution would end the corporate existence, the trustee could liquidate the business or negotiate the sale of the business, as a whole or in part, on behalf of the stakeholders; thus, the business entity could arise anew, keeping the jobs of employees and the assets of the entity in place, similar to *Terminator 2*, where the robotic human flexibly congeals after apparently deadly encounters with blasts, fires, and other mishaps.[208]

If the trustee determines that dissolution would be harmful to the public interest, the trustee could alternatively act to remove the directors and officers of the corporation.[209] The trustee could permit the innocent shareholders (and in circumstances of potential impairment, creditors)[210] who are unrelated to the removed officers and directors to replace the board and to assist the new board in selecting new officers. The whole point of the CDPA is to deter managers from using control to engage in a pattern of criminal behavior; thus, the remedy is to divorce such managers from control of corporate assets.[211] Whether achieved

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(election of trustee); *id.* § 1104 (appointment or election of trustee in a Chapter 11 reorganization case). Under Chapter 11, the debtor ordinarily remains in possession and control except in extraordinary circumstances, such as serious fraud or dishonesty, incompetence, or gross mismanagement of the business by the debtor or its managers. 7 COLLIER ON BANKRUPTCY ¶ 1104.02[1], [3][b] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2004) [hereinafter COLLIER]; *see also* 11 U.S.C. § 321 (eligibility to serve as trustee); *id.* §322 (qualification of trustee); *id.* § 323 (role and capacity of trustee). Once the trustee is in place, dissolution would follow corporate rules for winding up corporations.

207. *See* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 990–97, 1148–50 (3d ed. 1983) (describing dissolution and liquidation of corporations).

208. *Supra* note 34.

209. While the "public interest" is a vague notion, the size of the corporation and the need for the product or service would certainly factor into the decision. Other factors that would influence dissolution would include those identified as a basis for an upward departure in the federal sentencing guidelines. U.S.S.G. § 8C4.2 (risk of death or bodily injury); *id.* § 8C4.3 (threat to national security); *id.* § 8C4.4 (threat to the environment); *id.* § 8C4.5 (threat to a market).

210. In the federal bankruptcy context, parties in interest may request that a trustee be appointed for cause in a reorganization case, 11 U.S.C. §§ 1103(c)(4), 1104(a)(1), or general unsecured creditors may take an active role in electing a trustee in a liquidating case, *id.* § 702. "Parties in interest" might include a creditors' committee, an equity security holders' committee, a creditor, or an equity security holder. *See generally id.* §§ 1104(a), 1109(b); 7 COLLIER, *supra* note 206, ¶ 1104.02[2][a]. One reason to seek election of a trustee rather than merely having an appointed interim trustee is the need for the trustee to have specific knowledge of the business "to preserve assets or effectively administer the . . . estate to maximize the return to creditors." 6 COLLIER, *supra* note 206, ¶ 702.02. In the corporate death penalty context, the selection of a trustee could be by appointment, *see supra* note 164, or by election by parties in interest, including shareholders. The trustee could then work with a committee made up of shareholders and parties in interest, *see* 11 U.S.C. § 1102; (creditors' and equity security holders' committees); *id.* § 1103 (powers and duties of committees), to identify successors to the removed managers and directors. For publicly held companies, one source of expertise on that committee would likely come from institutional investors.

211. *Supra* Introduction.

through formal dissolution or merely ouster of management, the remedial purpose is accomplished.

Because one CDPA goal is encouraging prospective ethical conduct by managers of corporate assets, the CDPA would not apply to isolated criminal conduct by agents, criminal conduct not designed or intended to benefit the corporation, or criminal conduct completed before the adoption of the CDPA.[212] Of course, the corporation could always negotiate a housecleaning of management that materially acted or failed to act in relationship to the criminal conduct at issue prior to the issuance of the third strike, so long as innocent management remains in control.[213] The CDPA would be limited to corporate criminality so that individuals acting primarily for personal profit to the detriment of the corporation would be pursued through individual criminal prosecution with limited repercussion to the corporation.[214] Similarly, there would be a means for remedying misconduct that originated prior to the enactment of the CDPA.[215] This is in full accord with the purposes of the CDPA.

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212. One study found that between 1970 and 1980, 115 of the Fortune 500 companies had been convicted of at least one major crime or had paid civil penalties for serious illegal behavior. MARSHALL B. CLINARD, CORPORATE ETHICS AND CRIME 15 (1983) [hereinafter CLINARD, CORPORATE ETHICS] (citing *Corporate Crime: The Untold Story*, U.S. NEWS & WORLD REP., Sept. 6, 1982, at 25–26). From 1975 to 1984, 62% of Fortune 500 companies "were involved" in antitrust, bribery, environmental, or fraud offenses. *Corporate Crime by U.S. Companies*, BUS. L. BRIEF, May 1990, *cited in* Christopher Wray, Note, *Corporate Probation Under the New Organizational Sentencing Guidelines*, 101 YALE L.J. 2017, 2018 n.6 (1992). Another study reported that 1283 corporations were convicted of federal crimes from 1984 to 1987. Mark A. Cohen, *Corporate Crime and Punishment: A Study of Social Harm and Sentencing Practice in the Federal Courts, 1984–87*, 26 AM. CRIM. L. REV. 605, 606 (Winter 1989). With numbers that high, the risk arises that the CDPA could create a crisis in the economy if many businesses were dissolved or reorganized at the executive and board levels.

213. Similarly, removal could be limited to divisions or subsidiaries so long as there is no nexus of responsibility to the parent corporation or home office.

214. Recognizing that within a corporation there can be a divergence of interests among the agents, managers, and the owners, it would be irresponsible to further punish either the managers or the owners/shareholders for the misdeeds of the individual agent, particularly when such deeds, in essence, robbed the corporation (and through it, the shareholders) of assets. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 91–92 (1991) (recognizing that the contractual theory of corporate existence requires some degree of reliance on fiduciary principles because contracts are insufficient mechanisms in isolation to cover the vast array of possibilities for the divergence of interests as between the manager and the shareholder). While bad acts on the part of agents may be controlled through performance pay and regulatory oversight, such monitoring "may be inadequate to deal with one-time defalcations, when the manager concludes that the opportunities of the moment exceed any subsequent penalties in the employment market." *Id.*; *see also Fat Cats Turn to Low Fat*, THE ECONOMIST, Mar. 5, 2005, at 14 (reporting that "[a] study by the Boston Consulting Group of public companies recently found guilty of fraud calculates that the value of the stock options granted to the CEOs of those firms in the years before the frauds became public was 800% greater than those granted to the CEOs of comparable firms not found guilty of any wrongdoing").

215. Some sort of transitional amnesty period could operate to "smoke out" violations of law and assure that the Act has primarily a prospective application. The

B. Construction and Implementation of the CDPA

Implementing the CDPA raises many issues: first, identifying entities subject to the CDPA; second, exercising governmental authority under the CDPA; third, defining strikes; fourth, maintaining a record of strikes over time; and fifth, removing and replacing officers and directors. Each of these issues is addressed in turn.

1. Entities Subject to the CDPA

Under this proposal, an enacting government authority might define entities subject to the CDPA consistently with its present statutory scope,[216] adopt a broad definition similar to the federal definition of organization,[217] or adopt a more narrow definition that would include, at a minimum, publicly held corporations and other complex business organizations with larger, multitiered organizational structures and diffused individual responsibility.[218] Although a

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amnesty period would be similar to the June 27, 2002, order issued by the SEC in response to corporate fraud requiring a one-time sworn certification by CEOs and CFOs of 947 named U.S. public companies with annual revenues of $1.2 billion, or more accuracy in the company filings submitted to the SEC. *See* Order Requiring the Taking of Sworn Statements, Exchange Act Release No. 4-460 (June 27, 2002), *available at* http://www.sec.gov/rules/other/4-460.htm. For most of the companies, the certification was due by August 14, 2002. *Id.* (requiring the sworn statement to "be delivered for publication in written form . . . by the close of business on the first date that a Form 10-K or Form 10-Q of such Company is required to be filed with the Commission on or after August 14, 2002"). The order expired on January 31, 2003. *Id.* While the SEC deadline went into effect in a relatively short time frame of six weeks, it covered only the current year and was forward-looking. Moreover, the rule was implemented as "part of [the SEC's] goal of reassuring fraud-weary investors," coming on the heels of WorldCom's announcement of a $3.8 billion restatement due to accounting fraud. *See* Bostelman, *supra* note 129, at 566 (quoting SEC Chairman Harvey Pitt, Remarks Before the Economic Club of New York (June 26, 2002), http://www.sec.gov/news/speeches/spch573.htm). Because of the range of possible misconduct, a one to three year amnesty period should be considered for the CDPA, with the deadline related to the size of the company so that larger companies would be afforded more time than smaller companies. Although amnesty might protect the corporation from criminal liability and a CDPA strike, prior misconduct would continue to be considered to the same extent permissible prior to the CDPA's enactment.

216. California drafted the definition of "organization" to be consistent with other parts of its statutory code. S. 335, 2003 Leg., 2003-2004 Sess., tit. 6, § 40002 (Cal. 2003). Thus, California's proposed definition was defined broadly to include corporations as well as other organizational entities, such as nonprofit organizations and limited liability corporations. *Id.* At the federal level the entity subject to the CDPA could be the publicly held company, statutorily defined to be a company with 500 or more shareholders and assets exceeding $1,000,000. *See* 15 U.S.C. § 78*l* (2000). The SEC has exempted companies with assets not exceeding $10 million. 17 C.F.R. § 240.12g-1 (2005).

217. U.S.S.G. § 8A1.1 cmt. n.1.

218. *See* Brickey, *supra* note 66, at 195–97. Professor Brickey observes that for the purposes of assigning criminal liability as between a corporation and its officers, directors, and employees, the characteristics of a corporation, such as its size (as based on factors like annual sales and numbers of employees), are better distinguishing features than the form of business organization. Thus, the closely held corporation can have billions of

broad definition is preferable, this Article focuses on larger corporations and complex business organizations in evaluating the costs and benefits of implementing the CDPA because it is their misconduct that suggests need for a CDPA; however, there is a sound basis for concluding that narrower approaches could help resolve the inadequacy of the overall corporate regulatory structure on a more limited basis.[219]

The most encompassing approach would be to adopt the Organizational Sentencing Guidelines' definition of "organization" as "a person other than an individual."[220] The application notes of the Guidelines explain further that the term "organization" includes "corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations."[221] If the CDPA were federally enacted, adopting the Guideline's definition of "organization" would be optimal to promote consistency within the Guidelines. As a sentencing option, the CDPA would supplement the present ability of the Guidelines to divest criminal purpose organizations of net assets rather than act in lieu of that provision.[222]

2. Governmental Authority over Organizational Entities

Although federal statutory law governs some issues in corporate law, corporations are incorporated under state law, and a corporation's internal affairs are governed by the law of the state where it is incorporated.[223] Generally, the state's statutory code provides for the involuntary dissolution of the corporation if it engages in misconduct.[224] Assuming the CDPA is adopted by a state (as distinguished from the federal government), then the state's authority to revoke corporate charters is limited to corporations incorporated within that state because each state retains authority over corporations organized and incorporated under its

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dollars in annual sales and employ tens of thousands, or it can merely be a "mom and pop" organization where the officers are family members, and the employees are few. *Id.* at 195–96. The greater the number of employees, the more likely that activities and responsibilities are diffused within the organization and the less likely specific wrongdoers will be identified. *Id.* at 193–94.

219. *See* Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 829 (2004) ("The endless focus on large multinational corporations is a tacit admission that small corporations are not correlated with evil, thereby raising the possibility that wrongdoing is more accurately tied to some factor other than corporate status.").

220. U.S.S.G. § 8A1.1, cmt. n.1 (citing 18 U.S.C. § 18 (2000)).

221. *Id.* Perhaps a more apt title of such an Act might be the Organizational Death Penalty Act rather than the Corporate Death Penalty Act.

222. U.S.S.G. § 8C1.1.

223. *See* EISENBERG, *supra* note 77, at 101.

224. *See, e.g.*, CAL. CORP. CODE §§ 1801, 6511, 8511 (Deering 1997); DEL. CODE ANN. tit. 8. § 124 (2001); KAN. STAT. ANN. § 17-6104 (2003). As previously mentioned, the current power states retain to revoke corporate charters has not effectively served to stem corporate misconduct, presumably because states do not wish to repel corporations from chartering in their state, and the sanction of sudden revocation is likely to be more economically disruptive than the graduated approach argued for herein. *Supra* Part II.B.

laws.[225] For corporations incorporated elsewhere but transacting business within the state, the CDPA would revoke the corporation's license to do business in the state.[226] Moreover, the CDPA could require that the third strike occur within the state to provide a sufficient nexus to support an order of forfeiture of the entity's authority to transact business within that state.[227]

As a federal law applicable to publicly held corporations or organizations engaged in interstate commerce, the CDPA could find its authority in the Commerce Clause[228] and the Supremacy Clause[229] of the U.S. Constitution, just as the federal securities laws find authority in those provisions.[230] The sanction could

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225. *See* EISENBERG, *supra* note 77, at 101.

226. See, for example, California Senate Bill 335, which provides as follows:

> If a repeat offender is an entity formed under the laws of a jurisdiction other than this state and is qualified to transact intrastate business in this state, and its third or subsequent strike was a conviction by a state or federal court in California or if the facts giving rise to the conviction occurred in California, the Secretary of State shall, after a fair hearing and on the basis of substantial evidence that the entity is a repeat offender, order forfeiture of the entity's qualification to transact intrastate business.

S. 335, 2003 Leg., 2003-2004 Sess., tit. 6, § 40007 (Cal. 2003).

227. *See, e.g.*, *id.* § 40007(a). When applying the CDPA to out-of-state corporations, the third-strike nexus would avoid Dormant Commerce Clause claims. *See Corporate Three Strikes Act*, *supra* note 198, at 6 (assessing that the Act could implicate Dormant Commerce Clause if interpreted to "directly regulate or indirectly unduly burden interstate commerce," but concluding that there is no clear answer as to the likely outcome if such issue were to be litigated); *id.* at 7 (referring to the interstate commerce balancing test: "State regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate state end, and (b) the regulatory burdens imposed on interstate commerce . . . are outweighed by the state interest in enforcing the regulation" (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 408 (2d ed. 1988))).

228. "The Congress shall have power . . . [t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, 2 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 11.13[2], at 314–27 (4th ed. 2002); *see also* Baker, *supra* note 23, at 331–33 (recognizing that the federal government does not have comprehensive authority over public corporations, but the web of federal statutes and agency guidelines "are, in the aggregate, a powerful instrument"). The power to regulate all activities (both interstate and intrastate) that have a substantial effect on interstate commerce includes the power to enact criminal laws to regulate activities unrelated to commerce. *See generally* 3 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 44.13 (2d ed. 1997). Recently, the Court has pared the commerce power, but not in a way that threatens the proposal for a CDPA. *See* United States v. Morrison, 529 U.S. 598 (2000) (striking down the Violence Against Women Act because of lack of economic effect to regulated activity); United States v. Lopez, 514 U.S. 549 (1995) (holding that possession of a firearm within certain distance of school did not implicate economic activity within Commerce Clause power).

229. "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2; *see also* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 18–20 (2d ed. 1983).

230. *See, e.g.*, 1 HAZEN, *supra* note 228, § 8.1[3], at 747–50; 2 *id.* § 11.13, at 313. While it is tempting to limit the CDPA to corporations governed by the SEC or similar federal government regulatory agencies, such a limitation would exclude large organizations

apply to any entity that earns its third strike by a federal criminal conviction. Thus, the current constitutional and statutory framework legally supports such legislation.

3. Defining a Strike

The precise contours of what constitutes a strike is a policy-laden issue for the legislature and is thus beyond the scope of this Article. However, some discussion of general principles is appropriate. Given that businesses are subject to numerous laws and regulations, the most difficult aspect of the proposed CDPA is defining a "strike."[231] The CDPA is not intended to alter the landscape here. Penalties for corporate wrongdoing will continue to be graduated, including penalties such as probation and low fines, warnings, audits, surprise inspections, and compliance programs. The CDPA would be implemented only in response to three substantial violations. The three violations could occur on separate occasions[232] or be discovered through a single investigation in which multiple and

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that are not publicly held corporations. *See* Brickey, *supra* note 66, at 195–97 (recognizing that privately held companies can be significantly larger than some publicly held companies).

231. *See* CLYDE WAYNE CREWS, JR., TEN THOUSAND COMMANDMENTS: AN ANNUAL POLICYMAKER'S SNAPSHOT OF THE FEDERAL REGULATORY STATE (2001), *available at* http://www.cato.org/tech/pubs/10kc_2001.pdf (measuring the size of the increase in regulation by comparing the year-to-year number of pages in the Federal Register devoted to final rules; asserting that regulation is a means of off-budget taxation for the federal government and that such regulatory costs eat into the family budget of after-tax dollars). *But see* Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1359–81 (2003) (criticizing the "scorecards" of three leading reformists based upon unreliable data, unsupported assumptions, and nonreplicable conclusions, and arguing that such data fail to take into account the value of intangibles, such as improvements to environmental benefits like clean drinking water, or the value of human lives saved through government regulation). Not only are businesses subject to many laws, but those laws are legitimately open to contradicting interpretations. *See, e.g.*, Showalter, *supra* note 90, at 191–92, 199 (identifying the complexities of the civil False Claims Act, 31 U.S.C. §§ 3729–3733 (2001), and the Anti-Kickback Statute, 42 U.S.C. §§ 1320a-7a, -7b (2000), as applied to the healthcare industry, including the uncertainty in meaning of key statutory terms, recognizing that penalties for violations "can be extremely harsh," and cautioning that healthcare managers should "be prepared to seek competent legal counsel whenever there is any question about the propriety of their conduct").

232. Arthur Andersen, which was criminally prosecuted for obstruction of justice in connection with the Enron corporate accounting fraud, is a good example. *See, e.g.*, ROSOFF ET AL., *supra* note 82, at 293–94. Within about one year prior to the discovery of document shredding for its Enron client, the accounting firm had shredded incriminating Sunbeam documents and had agreed to a $7 million settlement in connection with charges it filed misleading audits for Waste Management, Inc., another client. *Id.* at 294. Negotiating a civil strike for the destruction of Sunbeam documents, and a second civil strike for the Waste Management audits, would have alerted the marketplace to the serious nature of the accounting firm's conduct. One can only speculate as to what might have happened had strikes been imposed as proposed here. *See* U.S. Sec. & Exch. Comm'n, Litigation Release No. 17039, Accounting and Auditing Enforcement Release No. 1410 (June 19, 2001), *available at* http://www.sec.gov/litigation/litreleases/lr17039.htm (announcing that Arthur Andersen agreed to pay a civil penalty in the amount of $7 million to settle a civil injunctive

distinct violations lead to convictions for separate crimes involving separate facts and circumstances.

At a minimum, the definition of a strike should include a "conviction of a felony crime arising from any violation of fraud, tax, bribery, extortion, consumer protection, environmental protection, civil rights, labor, employment, antitrust, political campaign, or finance law."[233] Furthermore, "[m]ultiple convictions arising out of the same facts and circumstances, *and* heard by the same court" would be treated as a single strike.[234] Requiring both factors avoids risk of prosecutorial abuse of discretion in charging multiple counts for a single illegal scheme to reach the three strikes; yet, it also prevents a windfall to corporations with widespread, varied illegal conduct discovered in the course of investigating one aspect of illegal conduct.[235] This narrow definition of strike is straightforward.

This Article, however, proposes to expand the strike definition beyond felony convictions to include some nonconviction resolutions as eligible for strikes one and two. Civil consent decrees and deferred prosecution agreements ("DPAs") employ virtually identical sanctions as those available for criminal convictions,[236] but they are without the stigma or collateral consequences that arise from a criminal conviction or guilty plea.[237] Often, civil liability presents a middle

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action, charging violations of antifraud provisions, and settled related administrative proceedings arising out of Arthur Andersen's audits of Waste Management, Inc.'s financial statements; the accounting partnership also agreed to the entry of a permanent injunction and a censure for engaging in improper professional conduct); U.S. Sec. & Exch. Comm'n, Litigation Release No. 17001, Accounting and Auditing Enforcement Release No. 1395 (May 15, 2001), *available at* http://www.sec.gov/litigation/litreleases/lr17001.htm (announcing that the SEC filed a civil injunctive action in U.S. District Court against top officers of Sunbeam Corporation and an Arthur Anderson auditor, asserting a scheme to fraudulently misrepresent Sunbeam's financial position in connection with a massive financial fraud); U.S. Sec. & Exch. Comm'n, Litigation Release No. 17952, Accounting and Auditing Enforcement Release No. 1707 (Jan. 27, 2003), *available at* http://www.sec.gov/litigation/litreleases/lr17952.htm (announcing settlement of SEC charges against former Arthur Andersen auditor and two Sunbeam officers in an order denying the accountant the privilege of practicing before the SEC as an accountant for at least three years); *cf.* Russell Mokhiber & Robert Weissman, *The Ten Worst Corporations of 2004*, 25 MULTINATIONAL MONITOR 12, Dec. 2004, *available at* http://www.multinationalmonitor.org/mm2004/122004/mokhiber.html.

233. S. 335, 2003 Leg., 2003-2004 Sess., tit. 6, § 40003(a)(2)(C) (Cal. 2003). The proposed language defined felony crime as "a crime that would be classified as a felony under Section 17 of the [California] Penal Code if the crime were committed in California, or a federal crime that is classified as a class A, B, C, D, or E felony, as defined in Section 3559 of Title 18 of the United States Code." *Id.*, tit. 6, § 40003(a)(2)(B).

234. *See* Cal. S. 335, tit. 6, § 40004 (emphasis added) (treating as a single conviction for purposes of the Act "multiple convictions arising out of the same facts and circumstances and heard by the same court").

235. *See supra* note 125.

236. *See supra* notes 110–11 and accompanying text (describing the use of deferred prosecution agreements in corporate criminal investigations).

237. There is some question as to whether stigma attaches based upon the distinction of civil versus criminal liability. Some scholars have concluded that reputational stigma attaches where the criminal violation involves *mala in se* offenses, such as contractor

ground, affording the prosecution a lower standard of proof and limiting the cost to the defendant in protracted litigation and its collateral consequences.[238] Sometimes, however, defense concern over the collateral consequences drives the negotiated civil or administrative resolution as a company recognizes that a criminal conviction would effectively operate as a death penalty due to the likely market response.[239] In these cases, the prosecution and the victims benefit by

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fraud, but does not necessarily attach to corporations where the criminal violation involves *mala prohibitum* offenses, such as accounting fraud or bribery. *See* Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 522–23 (1999) (noting that corporations are more likely to suffer reputational harm when the misconduct concerned related parties, such as those who have contractual relationships with the corporation, rather than third-party crime, such as environmental crimes); *see also* Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 414–15 (1991); Jonathan Karpoff & John Lott, *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993). Ironically, conviction may actually temporarily boost sales as consumers respond to management's increased marketing activity to stem negative reaction to news of conviction. *See* Baucus & Baucus, *supra* note 21, at 146. Nevertheless, a study found that longer term sales tended to suffer a decline in the three- to five-year period following corporate conviction for serious violations. *Id.*

238. *See* Mann, *supra* note 50, at 1798 (observing that punitive civil sanctions are replacing white-collar prosecutions because of the lower procedural barriers associated with civil enforcement as compared to criminal prosecution); Joseph F. Savage, Jr. & Stephanie A. Martz, *How Corporations Spell Relief*, 11 SPG CRIM. JUST. 10 (1996) (describing the use of federal laws to craft civil sanctions "that will penalize and prevent crimes by corporations while avoiding criminal prosecutions"). With respect to federal criminal prosecutions, the DOJ recognizes that "in every matter involving business crimes [prosecutors and investigators] must assess the merits of seeking the conviction of the business entity itself[,]" but "it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges . . . ." Thompson Memorandum, *supra* note 107, at introduction. When considering noncriminal alternatives to criminal prosecution, federal prosecutors are instructed to "consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct." Thompson Memorandum, *supra* note 107, at Part X.A; U.S.A.M., *supra* note 107, § 9-27.240 (initiating and declining charges—prosecution in another jurisdiction); *id.* § 9-27.250 (non-criminal alternatives to prosecution). However, even though the financial cost to a business as a result of administrative or regulatory litigation may be great, *see supra* note 127, at times the noncriminal route will not "adequately deter, punish and rehabilitate a corporation that has engaged in wrongful conduct." Thompson Memorandum, *supra* note 107, at Part X.A.

239. *See supra* Part I.B (discussing civil liability); Part I.C (discussing government regulatory, administrative, and civil action). The risk of overdeterrence is brought on by duplication between criminal sanctions and market-based or civil sanctions when those sanctions are imposed on the corporation at optimal total penalty levels without regard for the costs associated with the other's punishment. *See* Alexander, *supra* note 237, at 522. At least one study has concluded that the risk through duplication appears "limited by the process through which criminal cases are selected for prosecution" in that governments are less likely to seek criminal charges against corporations when the victim is a private party and more likely to bring criminal charges when the victim is a party that is an agency of the government. *Id.* at 512.

avoiding the costs of a criminal trial and an uncertain outcome,[240] but the driving force behind the negotiations is the defendant's goal of survival.[241]

Thus, a corporation might commit numerous acts that could constitute felonies yet successfully avoid prosecution simply because prosecutors take into account the collateral consequences. Consequently, first and second strikes might never be imposed despite prior serious misconduct because the decision would fall squarely within the discretion of the prosecutor,[242] who has before him or her the limited scope of the present criminal conduct. Given the complexity of business transactions, the prosecutor may not fully appreciate the seriousness of prior civil offenses. In contrast, if some of those civil resolutions also included the "strike" designation, the strike would inform the prosecutor of the serious nature of the prior misconduct without requiring inquiry into the seriousness of the prior misconduct.[243]

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240. The federal prosecutor may "consider the corporation's willingness to make restitution and steps already taken to do so." Thompson Memorandum, *supra* note 107, at VIII, IX. In addition:

> [The prosecutor] may: take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it . . . .

Id.

241. This is true especially where the stakes are high; that is, where the corporate interests are expansive, and the effect of an untimely death on its survivors, such as employees, investors, customers, vendors, and lenders, would be great. *See* PWC STUDY, *supra* note 81, at 4, 11–12. The study recognized a trend of "triple jeopardy" cases—cases being investigated by both the DOJ and the SEC, as well as being privately litigated. *Id.* at 12. The study concluded that in triple jeopardy cases, "the stakes go up" with higher settlement values, fines, penalties, and potential civil and criminal penalties for current and former employees. *Id.*

242. Federal prosecutors "may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges," and should ignore corporate structure barriers and consider the conduct of "subsidiaries or operating divisions." Thompson Memorandum, *supra* note 107, at V.

243. This proposal is a rational extension of the DPAs, which are negotiated agreements. *See supra* text accompanying note 107. As Peikin recognizes, "Arthur Andersen remains virtually the only major business organization to face prosecution in the recent wave of corporate scandals." Peikin, *supra* note 107. However, Arthur Andersen had a history of prior misconduct and was on probation from an SEC order at the time of its prosecution. *Off the Hook*, *supra* note 110. Negotiating strikes in the DPAs would provide a record for the prosecution that would extend beyond the limited probation period of eighteen to twenty-four months in the typical DPA. During the DPA probation period, the corporation risks prosecution or agreed-to fines if it violates probation. *See* Peikin, *supra* note 107; Warin & Schwartz, *supra* note 107, at 127 (observing that in the Coopers & Lybrand DPA, the government "reserved the right to fine Coopers $ 100,000 [sic] for each breach of the diversion agreement for which it chose not to prosecute the firm"). Although the right to prosecute or collect fines would terminate with the end of the probation period, the CDPA would maintain a record of the strike for fifteen years. *See infra* Part III.B.4.

Furthermore, negotiated civil and administrative strikes favor business interests.[244] Accepting a negotiated strike and promising improved corporate conduct affords management the opportunity to remedy misconduct rather than face likely death. Alternatively, if prosecuted criminally, the fallout of prosecution might be the effective death of the organization, obviating the need for three strikes.[245] One could easily conclude that the CDPA will not realistically impact corporate criminal liability or organizational punishment unless some civil and administrative resolutions can be negotiated as strikes.[246] Therefore, government enforcement authorities should have discretion to negotiate for a stipulated strike.[247]

Additionally, the U.S. Attorneys' Manual provides that pretrial diversion is not available to "[a] person with two or more prior felony convictions." U.S.A.M., *supra* note 107, § 9-22.100. Thus, the CDPA would not effectively prohibit a corporation with two prior strikes from negotiating another DPA because it is a civil resolution, *see supra* text accompanying note 200; however, it could require inclusion of negotiated strikes in DPAs, even beyond the first two strikes, to keep the corporate "rap sheet" up to date.

244. *See supra* text accompanying note 114 (observing that stakeholders and investors greet DPAs with enthusiasm).

245. *See supra* notes 69–73; Part I.A (discussing the potential consequences of criminal convictions on organizations).

246. If the CDPA were implemented as a state law, then the use of alternative civil resolutions as strikes would likely be limited to violations pursued by that state unless the state persuaded attorneys general in other states to negotiate civil settlements that recognize the settlement could count as a strike. Likewise, if several states adopted a CDPA, those states might offer reciprocity for civil strike identification using a database to share first- and second-strike information. This resolution might be possible when the CDPA state is a party to a multistate global civil settlement. Global settlements are used to address widespread corporate misconduct that spans several jurisdictions and may potentially include regulatory, civil, and criminal violations by a corporation. *See* O'SULLIVAN, *supra* note 23, at 1035–36 (describing the benefits of seeking a global settlement when a corporation faces parallel proceedings that may include criminal, civil, and administrative proceedings, but recognizing the difficulty in achieving such settlements given the differing priorities of the agencies or plaintiffs and the disparate nature of their "goals in investigating and litigating"). One important limitation, at least for prosecutors, is the concern that a global settlement not be viewed as an abuse of the prosecutorial power to "extort a civil settlement." *Id.* at 1035.

247. When corporations take affirmative action to ferret out and remedy criminality (perhaps including restitution to victims), government authorities should retain discretion not to impose a strike. *See* ANTITRUST DIVISION, DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), *available at* http://www.usdoj.gov/atr/public/guidelines/0091.htm (providing for leniency when a corporation self-reports violations prior to investigation by the DOJ); U.S.S.C. REPORT, *supra* note 64, at 27 (reporting that "[c]urrent and former U.S. Department of Justice officials have stated to the Advisory Group that the U.S. Department of Justice has declined prosecutions based on the existence of an effective compliance program"); *see also* Andy Pasztor, *Coopers Settles in Symington Dealings*, WALL ST. J., Sept. 23, 1996, at B12 (reporting that the U.S. Attorney's Office declined prosecution of Coopers & Lybrand in connection with its investigation of former Arizona Governor Fyfe Symington based upon Coopers' cooperation with the government); News Release 96058, U.S. Dep't of Justice, Top Corporate Officials Indicted for Environmental Crimes in Slaughterhouse Pollution (Feb. 21, 1996) (explaining, after guilty pleas by the corporation, the government's decision to decline prosecution of its parent company, Chiquita, as "a

Thus, the ideal definition of a strike might include noncriminal acts resulting in fines or settlements, at least for first and second strikes, provided that such alternative legal resolutions specifically recognized them as agreed strikes. The third strike would require a felonious crime since it would lead to dissolution or, at least, removal of directors and officers. At a minimum, strikes would include felony convictions for violating specified statutes; felony strikes could be further refined to consider the amount of gain or loss in economic crimes, prior sanctioned misconduct that did not result in a strike, intentional bad acts, and the physical death or serious injury to individuals in environmental protection, labor, and employment crimes.[248] Essentially, strikes should be reserved for the most serious corporate crimes that result in substantial economic damage or harm to humans.

4. The Life Span of a Strike on the Organizational "Rap Sheet"

While a human's criminal life span cannot extend beyond the human's physical life span, the corporation can exist indefinitely; therefore, a time limit should be imposed to discard "stale" strikes and reward a clean record.[249] The offenses addressed by this proposal are intended to be serious offenses that cause serious harm to investors, employees, consumers, or the public. Given the complex nature of some corporations, such offenses may be difficult to detect, and a single investigation may continue on for many years.[250] Carrying strikes for fifteen years would realistically afford time to prosecute three serious offenses or to meaningfully redefine long-term corporate culture. Moreover, a shorter stale strike period, such as ten years, would affirm by negative implication that two serious criminal offenses every ten years is permissible.[251] This is the wrong message to convey to corporate leaders. Also, the time period must be long enough to ensure a long-term positive change in corporate culture.[252]

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good example of the Department's policy to encourage voluntary disclosure of environmental violations").

248. A minimum level of economic or human cost could be established as a threshold for imposing a strike. For example, at the federal level, the minimum threshold for economic harm could be correlated to the calculated offense level and culpability score used to calculate criminal fine ranges for organizations in Chapter 8 of the Sentencing Guidelines. *See* U.S.S.G. §§ 8C2.4, 8C2.6, 8C2.7; *supra* note 54.

249. In some state sentencing systems, older convictions for individuals may be discounted or disregarded as "stale" when considering criminal history. NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 298 (2004).

250. For example, Enron Corporation filed for bankruptcy protection on December 2, 2001, "amid allegations that Enron artificially boosted profits and hid debts totaling over $1 billion." U.S.S.C. REPORT, *supra* note 64, at 35; ROLE OF THE BOARD, *supra* note 128. In July 2002, a task force was formed to address the Enron and other similar financial debacles. *See* Exec. Order No. 13,271, *supra* note 130. As of today, that investigation continues with trials certain to extend into at least January 2006. *Enron Trials Set for January 2006,* CHARLESTON GAZETTE, Feb. 25, 2005, at 3D.

251. California Senate Bill 335 proposed a ten-year period after the effective date of the law. S. 335, 2003 Leg., 2003-2004 Sess., tit. 6, § 40003(a) (Cal. 2003).

252. The risk of imposing a period greater than fifteen or twenty years is that the yoke of the corporate death penalty would drag down legitimate corporate profits of the rehabilitated corporation. Moreover, if the corporation dismissed the top executives, board

5. Removal of Officers and Directors When Dissolution is Harmful to Public Interest

After the third strike, a trustee would be appointed, and the trustee would have the option of removing directors and officers if it determines that dissolution would be harmful to the public interest.[253] The public interest is harmed when the organization provides valuable jobs, services, or products, and the prospect of dissolution would impose excessive costs upon innocent stakeholders.[254] Generally, liquidation should operate to preserve rather than destroy the going concern value of a business and the ability of the business to apply its assets to the production of goods that are in demand.[255] Thus, dissolution would operate to divorce corporate assets from the control of managers who have permitted a pattern of serious criminal conduct rather than to destroy corporate value altogether.

Like any major organizational change, wholesale removal of the officers and directors will disrupt the organization; however, the disruption has intended

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members, and any directly responsible employees after the first or second strike, arguably new management should start with a clean slate, or at least some shortened period of life span for prior strikes. After all, that could be one ultimate sanction under the CDPA, and the very purpose of the Act is to encourage prompt remedial action by errant corporations. *See supra* text accompanying notes 208–09; *infra* Part III.B.5 ("Removal of Officers and Directors when Dissolution is Harmful to Public Interest").

253. *See supra* notes 210–12 and accompanying text.

254. The California proposal reportedly failed on a 6-6 vote in the Senate Appropriations Committee due to concern of harm to investors and jobs. *See* Michael Gardner & Traci Isaacs, *Group Pickets Bowen for Stance on Corporate Crime Bill*, DAILY BREEZE (Santa Monica, Cal.), June 6, 2003, at A1 (reporting that consumer groups picketed outside the office of democratic Senator Debra Bowen, who explained her vote against the Corporate Three Strikes Act by reasoning that "[t]here is no way you can dissolve a corporation and protect investors and jobs"). The legislation had made dissolution of the corporation contingent upon the consideration that court orders in connection with the dissolution and forfeiture of corporate assets must "ensure that jobs and wages are not lost, . . . protect community interests and legitimate investor interests, and . . . maintain the entity's obligations to protect the health, safety, and environment of workers and the public." Cal. S. 335, tit. 6, § 40006(c). Unlike California's proposal, although the CDPA would require the trustee to consider these facts in assessing potential harm, the presence of these factors would not necessarily preclude imposition of the death penalty. Of course, the more detrimental the factors are, the more likely the trustee would elect removal rather than dissolution.

255. Typically, dissolution requires that all assets be reduced to cash at the highest value practicable and that a subsequent payment be made to satisfy all creditors, with shareholders getting a residual distribution. *See, e.g.*, REV. MODEL BUS. CORP. ACT §§ 14.05, 14.31, 14.32 (2003). The CDPA could feed into these dissolution procedures by deeming a CDPA dissolution to be a judicial dissolution. *See* DEL. CODE ANN. tit. 8, § 284 (2001). Alternatively, the CDPA could have its own specialized corporate dissolution procedure. The trustee or receiver would be subject to fiduciary responsibilities in proceeding to discharge his or her duties in either event. *Supra* note 206. This process of dissolution, supervised under fiduciary concepts, is specifically designed to preserve value (including going concern value) and protect creditors, employees, and other innocent stakeholders.

long-term positive benefits.[256] Naturally, the trustee or receiver would assume temporary control over the corporate business pending appointment of board members, who would then stand for election by shareholders where the shareholders could certainly assist in identifying appropriate board members.[257] The trustee would be obligated to assure shareholder interests are protected during this process.[258] Once the new board members are appointed, they would then select new management leadership.[259] In short, the CDPA can be administered to divorce corporate assets from errant management with limited collateral damage.

The touchstone of the CDPA is its flexibility in achieving the goal of divorcing corporate assets from errant management. Removal of the managers and directors clears the way for new managers and directors who, ideally, will create a positive corporate culture[260] unencumbered by the "miscreant agents"[261] who created or permitted a culture of criminality[262] and of board members who permitted misconduct to thrive.[263] These miscreant individuals can be barred from

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256. Debarment is presently used as a remedy or punishment in some circumstances, but only as to specific individuals and not an entire management team. *See, e.g.*, *supra* note 103 (citing Sarbanes-Oxley Act, SEC regulations, and sentencing guidelines that bar involvement); Part I.C.

257. *See* DEL. CODE ANN. tit. 8, § 141 (Supp. 2005). The process by which the trustee undertakes this task thus need not be extended and disruptive to shareholder voice.

258. The corporation will pay the cost of the trustee, much like a bankruptcy trustee. *See* 11 U.S.C. § 326 (2000) (limitation on compensation of bankruptcy trustee); *id.* § 330 (compensation of officers). The bankruptcy statutes also contemplate the hiring, *id.* § 327 (employment of professional persons), and compensation of professional persons, *id.* § 328 (limitation on compensation of professional persons), to aid and assist the trustee in the performance of trustee duties. *See also id.* § 704 (duties of trustee); *id.* § 1106 (duties of trustee and examiner). Section 1106(a)(1) specifically incorporates section 704(2), (5), (7), (8), and (9) into the duties of the trustee under reorganization in bankruptcy.

259. *See* DEL. CODE ANN. tit. 8, § 141(a).

260. *See supra* Part II.B.

261. The term is applied in the Thompson Memorandum, *supra* note 107, at I.

262. *See supra* note 177.

263. Boards of directors are also charged with leading from the top and demonstrating ethical conduct. When they fail to enforce protection of the corporate fisc, the organization is at risk. *See* U.S.S.C. REPORT, *supra* note 64, at 36 n.138 (identifying six separate areas in which the Enron board of directors had been negligent: "fiduciary failure, high risk accounting, inappropriate conflicts of interest, extensive undisclosed off-the-books activity, excessive compensation, and lack of independence" (citing ROLE OF THE BOARD, *supra* note 128; Preliminary Report of the American Bar Association Task Force on Corporate Responsibility (July 16, 2002), *available at* http://www.abanet.org/buslaw/orporateresponsibility/preliminary_report.pdf)); *see also* Seth Schiesel, *Most of Board at WorldCom Resign Posts*, N.Y. TIMES, Dec. 18, 2002, at C7 (reporting that six directors of WorldCom resigned after two federal judges approved the hiring of a new CEO and Chairman; that one director had resigned a week earlier; that another resigned in October 2002 after questions regarding use of a WorldCom airplane; and that the four remaining directors joined the company subsequent to its filing for bankruptcy protection in July 2002). The board resignations reportedly "clear[ed] the way for the company's creditors and new chairman to appoint a board untainted by an accounting scandal." *Id.*

serving as officers and directors in various ways.[264] The point, however, is that they bear the burden of the penalty while others are shielded to the maximum extent possible.[265] From a market point of view, the removed managers may well suffer market stigma, but the stigma of being a criminally inclined corporation is removed from the innocent stakeholders.

One potential response to the practical application of the CDPA is that the offending officers or directors would flee the corporation shortly before the third strike was imposed, thereby avoiding imposition of the prohibition on majority control of a new corporation. Therefore, directors and officers should have strikes follow them into new corporations; however, this issue pertains more to standards governing bars rather than the CDPA.[266] Another potential response to the practical application of the CDPA is increased cooperation, particularly from new managers of an entity with one or two strikes.[267]

Under the Organizational Sentencing Guidelines, the goal is to encourage good corporate citizenship through the creation, administration, and enforcement of an effective program to prevent and detect violations of law.[268] When such a program is in place, its existence can be used to lessen the sanctions imposed on the corporation. When violations do occur, the corporation is given credit for self-

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264. *See, e.g.*, S. 335, 2003 Leg., 2003-2004 Sess., tit. 6, § 40003(c) (Cal. 2003) (providing that "[a]n entity subject to this title shall not be incorporated, formed, or transact intrastate business in California if a majority of its directors or officers were directors or officers of a repeat offender when it became subject to subdivision (b) [incurring a third strike]. . ."). A similar provision could be implemented under the CDPA.

265. *See supra* note 103 (discussing Sarbanes-Oxley, SEC regulations, and sentencing guidelines that bar industry participation for violating certain criminal or regulatory laws). Because the removed officers and directors are not personally charged or convicted of any crime under the CDPA, debarment of the individual is not imposed. The CDPA only prohibits the combination of actors in a new business organization. *See supra* note 264. On the other hand, the removed officers and directors remain subject to any criminal or civil penalties (including debarment) that might be imposed on them for personal misconduct in connection with the acts that led to the organization's third strike and application of the CDPA removal requirement. Moreover, there is no reason why removal pursuant to the CDPA should not be included as a basis for being barred from serving as a senior officer or director of a publicly held company under the federal securities laws.

266. *Supra* note 265.

267. In deciding whether to initiate or decline charges against corporations, prosecutors are directed to consider the corporation's "willingness to cooperate in the investigation of its agents." Thompson Memorandum, *supra* note 107, at II; *see also* U.S.A.M., *supra* note 107, § 9-27.230.A.6 (factoring cooperation into the charging decisions against individuals).

268. *See* U.S.S.G. § 8C2.5(f) (effective compliance and ethics program). *But see* Parker, *Rules Without*, *supra* note 12, at 407–11 (attacking the Sentencing Guidelines' "carrot and stick" approach in section 8C2.5 of the Sentencing Guidelines as seeking out the "biggest stick" by placing fine determinations at statutory maximums so that the government can force corporations to consume the "poisonous" carrot—that is, providing the government with the greatest "leverage over the internal mechanisms of private firms").

reporting, cooperation, and acceptance of responsibility.[269] When self-reporting may lead to another strike, or even the fatal third strike, the CDPA would permit the trustee to take into account the cooperation of managers and directors who acted preemptively to detect, report, and cooperate with authorities, as distinguished from those who were merely reactive or counteractive to the discovery of criminality by law enforcement or regulators.[270] Thus, the trustee might retain, in the interest of public welfare, a limited number of managers or directors who have demonstrated commitment to a law-abiding corporate culture, or managers or directors who were not present at the time of some of the strikes. The trustee should exercise this discretion with a view toward achieving the underlying purpose of the CDPA without unduly burdening largely innocent managers.[271]

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269. U.S.S.G. § 8C2.5(g) (self-reporting, cooperation, and acceptance of responsibility); *see also* ISRAEL ET AL., *supra* note 78, at 79–81 (quoting excerpts from Press Release, U.S. Attorney's Office, S. Dist. of N.Y. (Oct. 27, 1994), regarding a settlement of deferred prosecution reached with defendant PSI for securities violations):

> [The United States Attorney] said that the decision to enter into a deferred prosecution agreement with PSI was based on a variety of factors, including: [PSI's agreement to make further restitution], PSI's cooperation with the United States Attorney's Office during the investigation, including its acknowledgment of its own wrongdoing; the concern that an indictment would cause crippling collateral consequences to thousands of innocent employees and investors; and the fact that the core of the criminal conduct occurred in the 1980's and the departure from PSI of the individuals believed to be responsible for the wrongful acts.

ISRAEL ET AL., *supra* note 78, at 81.

270. The decision to implement an effective corporate compliance program is not without risks. *See* Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 71 WASH U. L.Q. 375, 379–80 (1993) (suggesting that prosecutors could use the company's compliance program as the standard by which the corporation or its employees should have acted, and further, to the degree that the corporation makes or retains records in conducting internal investigations through its compliance program, such records potentially could be discovered and used against the corporation in a later criminal prosecution (or in civil litigation)); *see also* Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1 (1997); *cf.* Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 470–71 (1994) (recognizing that corporate managers may conclude that it is not in the best interest of the corporation for the manager to report wrongdoing in that disclosures may trigger liability, where detection by prosecutors is otherwise unlikely). *But see* Charles J. Walsh & Aliss Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS L. REV. 605, 683–84 (1995) (arguing that a corporate compliance defense could "deter prosecutions that are not socially useful" and could reduce the costs of investigation for the prosecution because corporations will be more likely to assist, rather than obstruct, investigations if the fear of prosecution is removed).

271. For a discussion of theories upon which criminal conduct may be attributed to corporate officers, managers, and supervisors, see 1 BRICKEY, CORPORATE CRIMINAL

C. The Costs and Benefits of the CDPA

There is a cost to society when an entity engages in criminal conduct. Some costs of criminal conviction would be incurred whether or not the CDPA applied. Whether the corporation is dissolved or reorganized,[272] restitution should be awarded if warranted.[273] Additionally, even if the corporation is reorganized, the criminal fine should still be levied.[274] As is the case in the calculation of any corporate fine, the fine will be based to some degree on the corporation's ability to pay.[275] Finally, probation should be imposed on the reorganized corporation to ensure that its new leaders act responsibly.

Why are corporations frequently dissolved due to financial incompetence and market forces but rarely intentionally dissolved due to managerial deceit and criminal action? Certainly, one problem is that, currently, the only remedy similar to dissolution is divestment of assets—a penalty that would directly harm only shareholders and other stakeholders.[276] Potential costs of the CDPA, on the other hand, are explicitly intended to punish managers who permit crime to flourish within their enterprise and to minimize imposing costs on innocent shareholders.[277] Such costs and effects are assessed below.

LIABILITY, *supra* note 5, §§ 5:01–:20. Professor Brickey identifies three theories of liability: direct criminal liability for actions taken, even if for the benefit of the corporation; accomplice liability; and strict liability for "failure to control the corporate misconduct." *Id.* § 5:01.

272. "Reorganized" is used here to refer to removal and replacement of corporate officers and directors.

273. *See supra* note 54 (restitution under U.S.S.G.); *see also* Thompson Memorandum, *supra note* 107, at VIII (charging a corporation: restitution and remediation); *id.* at XII (plea agreements with corporations).

274. *See* Parker, *Optimal Penalties*, *supra* note 12, at 572–73 (dismissing the pass-through objection to criminal monetary fines—that fines will be passed on to customers through higher prices or through increased unemployment—by reasoning that such pass-through will only occur if their prior position relied upon the "infliction of uncompensated criminal harm to others").

275. *See, e.g.*, *supra* note 54 (reviewing calculation of fines under U.S.S.G.).

276. Loss of retirement savings, pensions, college savings, and medical insurance could all be side-effects of a dissolution. *See, e.g.*, FRIEDRICHS, *supra* note 5, at 80 (describing Enron's loss in stock value over a year from more than $90 per share to about twenty-six cents). Enron employees, however, were prohibited from cashing out their retirement funds "during a critical period of declining stock value in 2001," losing more than 90% of their retirement portfolios because they had been strongly encouraged to invest in the corporation's stock. *Id.* With the CDPA, investors and employees could stem losses by selling stock after the first or second strike. Criminal conviction results in costs to corporations even without the CDPA. *See* Baucus & Baucus, *supra* note 21, at 148–49 (finding that convicted firms experience lower sales growth three to five year after conviction, and that "repeated convictions accentuate negative conviction-performance relationships").

277. If the trustee elects to remove the officers and directors, short-term costs might rise in response to the uncertainty created in the interim prior to the installment of replacement board members and officers; yet, costs are not always as expected. *See* Matt Krantz, *Ousting CEOs Often Boosts Stock Price*, USA TODAY, Feb. 11, 2005, at B1 (reporting that stockholders are willing to experience high turnover in corporate leadership

1. The Plight of the "Innocents"

Certainly, the employees, vendors, and customers may face some degree of uncertainty as a result of the prospect of involuntary dissolution or instability of management.[278] As a general matter, however, even dissolution should not operate to inherently prejudice these innocent bystanders; the trustee will be obligated, at worst, to dissolve the corporation—not to shutter factories or toss employees overboard. Dissolution means simply that assets are sold for the highest price possible, meaning factories and jobs are generally transferred intact.[279] Shareholders could bear costs beyond those associated with corporate criminal convictions[280] because the cost of the trustee and the lawyers would be billed to the corporation and, therefore, would diminish corporate assets.[281] Nevertheless, these same constituencies could benefit from the removal of the prospect of a criminally promiscuous corporate culture—the end goal of the CDPA.

Because of the separation of management from owners, "innocent" shareholders lack insight into the daily corporate activities and may not realize

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to enhance corporate financial performance). The fact that shareholders and directors "value[] earnings growth over any personal relations with management," *id.*, may suggest that shareholders would be unhappy with management that places corporate social responsibility over cost savings. *See supra* notes 9, 10, 178.

278. *See supra* note 277. This uncertainty could itself create costs to the corporation. *See, e.g.*, Bill Atkinson, *Kmart Files Chapter 11 Bankruptcy*, BALT. SUN, Jan. 23, 2002, at 1A (reporting that Kmart sought protection against creditors on January 22, 2002, after vendors cut off supply shipments and the company's debt was downgraded; moreover, mutual funds were forced to sell the stock after Standard & Poor's removed the company from its S&P 500 list); Karen Talaski, *Kmart Faces 1,900 Claims So Far*, DETROIT NEWS, Apr. 7, 2002, at 1B (reporting that since the filing of bankruptcy in January 2002, some suppliers that supply "essential products" have been designated "critical vendors" by the bankruptcy court, allowing Kmart to pay those creditors; most noteworthy, Kmart's garbage hauler threatened to stop trash pick-up until its $6 million bill was paid). Nevertheless, for a profitable company that can continue profitable operations without criminality, there should be no risk of nonpayment in dissolution since creditors always get paid first in any liquidation. *See, e.g.*, DEL. CODE ANN. tit. 8. § 281(b) (2001) (providing that shareholders may only be paid assets "remaining" after creditors have been satisfied).

279. *Supra* text accompanying notes 253–55.

280. *See supra* Part I.A.

281. The trustee would oversee disbursement of corporate funds either through the time of reorganization or dissolution. *See supra* note 255; *cf. Business Briefs*, THE RECORD (BERGEN COUNTY, NJ), Sept. 4, 2004, at A15 (reporting that professional fees for the Enron bankruptcy may exceed $700 million, making it the most expensive bankruptcy, and comparing those fees to the professional fees in WorldCom, Inc.'s bankruptcy of $613 million). Other sources suggest that the professional fees in the Enron bankruptcy were likely to top $1 billion. *See, e.g.*, Loren Steffy, *Enron Bankruptcy Adviser Deserves Fee, But Get in Line*, HOUS. CHRON., Sept. 8, 2004, at B1. Of course, these are extreme examples of the costs of bankruptcy fees because Enron and WorldCom are two of the largest bankruptcies ever filed. *See supra* notes 134, 260. Nevertheless, the fees are relevant to this discussion in that the CDPA is intended to address widespread criminal misconduct by large corporations.

corporate criminal activity is occurring.[282] Yet, if the corporation is criminally convicted, the cost is borne by the shareholders in lowered assets through the payout of a fine, lowered share value, and costs to capital in terms of higher borrowing rates due to the more precarious stance of the corporation.[283] Unless it is the extraordinarily rare circumstance[284] in which the corporation earns all three strikes in one investigation, shareholders would have had time to divest the stock before the third strike is reached and thereby protect their capital investment.[285] Shareholders retaining or purchasing shares of the corporation under the riskier conditions will do so presumably because they are willing to assume the risk of any prospective action under the CDPA.[286] Indeed, shareholders who invest under these riskier circumstances can be expected to provide additional oversight of corporate activities to protect their financial interests by discouraging corporate misconduct.

If the corporation earns all three strikes in one investigation, shareholders would not have had the benefit of foreshadowing from the publication of prior strikes.[287] Still, shareholders presumably received the benefit of the criminality in terms of higher dividends or other benefits to the value of the corporation, such as overvalued stock due to costs savings from criminal conduct.[288] Thus, it is unlikely that the CDPA will cause significant additional share value loss over the loss resulting from market reaction to news of corporate criminality or due to offset from prior value gain.

The loss of jobs is the political hot-button of the CDPA. In any business, even a criminal purpose organization, there may be employees who had no decisionmaking authority and no role in the offense.[289] The CDPA addresses the

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282. *See* KELLY, *supra* note 4, at 35. *See generally* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Transaction Publishers 1991) (1932).

283. Share value would decline because of market recognition that the corporation will experience costs in terms of reputation, criminal fines, and potential civil litigation stemming from the criminal conviction. *See* Baucus & Baucus, *supra* note 21 (discussing reputational harm).

284. Imposing the CDPA will be rare in itself. *See supra* Part III.A.

285. *See supra* note 277; *infra* note 287.

286. *See* KELLY, *supra* note 4, at 33 (asserting that because the corporation only receives new capital when additional shares are issued, the trading of stock amounts to speculation as shareholders trade shares from one to another).

287. Investors will flee as the misconduct is reported. *See, e.g.*, Elliot Blair Smith, *Strong Resigns as Charges Seem Near*, USA TODAY, Dec. 3, 2003, at 1B (reporting that founder Richard Strong of Strong Capital Management, a mutual fund company, resigned amid the possibility of legal charges by state and federal regulators and an outflow of $2 billion in investor funds in recent weeks "that challenges the firm's survival").

288. *See* KELLY, *supra* note 4, at 45 (observing that "[o]ne way or another—through direct payout or increased firm value—the benefits of profit flow to shareholders").

289. Many low-skill jobs are being moved to other countries with lower costs for wages and benefits. Barbara Hagenbaugh, *Moving Work Abroad Tough for Some Firms*, USA TODAY, Dec. 3, 2003, at 1B. Growth in employment in the United States has been mainly in those sectors where the jobs cannot be exported, such as the construction and service industries. *See, e.g.*, Louis Uchitelle, *Employers Balk at New Hirings, Despite Growth*, N.Y. TIMES, Dec. 6, 2003, at A1 (reporting that the job recovery since the 2001

issue of the innocent employee by requiring the trustee to consider the impact of dissolution on the public welfare.[290] Some removed officers and board members may have also been "innocent"; however, because they held positions of authority, they were better positioned to directly discourage or discover criminality.[291] The text of the CDPA would specifically limit the costs in job losses to employees by weighing that cost in determining dissolution and minimizing those costs in how its base goal is implemented.

Likewise, the trustee would consider vendors' loss of the corporate customer and the customers' loss of product or service.[292] If the trustee elects removal over dissolution, no significant costs would be borne by these groups even though customers might face greater costs in the product or services due to fines and the cost of reorganization.[293] Nevertheless, any assessment of costs must be weighed against the overall cost to society from white-collar crime; although estimates differ as to the direct annual economic losses from white-collar crime in the United States, the estimates range from as low as $40 billion a year to as high as $1 trillion annually.[294] Beyond these direct costs are the indirect costs, such as increased taxes and insurance rates; the physical costs, such as work-related diseases and accidents; and the intangible costs, such as the erosion of trust in our

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recession has been "mostly in lower-wage sectors" while "[h]igher-wage manufacturing jobs have continued to disappear").

290. *See supra* Part III.B.5.

291. *See supra* notes 253–71 and accompanying text (addressing the removal of officers and directors and the trustee's discretion to retain some officers or directors under limited circumstances).

292. Not only would this loss include the taxes contributed by the corporation, it would also include the indirect business and community opportunities that accompany the presence of a major employer. People often choose to live near employers; thus, the loss of an employer can lower property values, decrease sales of nearby supportive businesses, such as restaurants and entertainment, and diminish support for even public and social entities, such as schools and churches, as persons leave the community in search of economic opportunities elsewhere. *See generally* ROGER & ME (Dog Eat Dog Films 1989) (contemplating the devastating effects of an automobile plant closing to the town of Flint, Michigan).

293. *See* Block, *supra* note 237, at 401–02; Jason M. Lemkin, Comment, *Deterring Environmental Crime Through Flexible Sentencing: A Proposal for the New Organizational Environmental Sentencing Guidelines*, 84 CAL. L. REV. 307, 342 (1996); *see also* Parker, *Optimal Penalties, supra* note 12. *But see* FRANCIS T. CULLEN, WILLIAM J. MAAKESTAD & GRAY CAVENDER, CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND 352–53 (1987) (disputing the argument that the cost of criminal fines to corporation will be passed on to consumers in the form of higher prices).

294. *See* FRIEDRICHS, *supra* note 5, at 47. Estimated economic losses for conventional offenses (such as burglary and robbery) are around $4 billion a year. *Id.* Losses to employees and investors of Enron have been estimated at $50 billion. *Id.*; *see also* David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 637–38 (1999) (conservatively estimating the cost of corporate financial crime at $200–$565 billion annually, a subset of which is the $52.9 billion cost for financial institution fraud in a typical year). Note that Professor Anderson's estimates were published in 1999, prior to the Enron bankruptcy and corporate accounting scandals that led to passage of the Sarbanes-Oxley Act. *See supra* note 130 (describing the enactment of the Sarbanes-Oxley Act).

business markets or confidence in the equity of our legal system.[295] These costs seem to heavily outweigh the marginal costs to suppliers, shareholders, consumers, and employees.

The CDPA is principally intended to deter; but, if it fails to deter, then it is intended to clean house. It would only be imposed upon corporations with a history of serious wrongdoing or upon corporations involved in multiple acts of criminality. The sanction would be compared first to the sanction that might otherwise be imposed and then to the cost of permitting crime to continue unchecked. Fines that are less than the gain to the corporation or the loss to the victims reaffirm the corporate decision to engage in the criminal conduct as a financially sound decision.[296] The CDPA or the threat of the CDPA reminds the corporate decisionmaker that the cost to the corporation and to the decisionmaker may far exceed the benefit.

2. The Opportunity for Abuse

The CDPA presents a potentially powerful tool for abuse by prosecutors seeking glory or lacking discretion, by competitors seeking advantage or lacking scruples, and by disgruntled employees seeking revenge or a qui tam recovery. For even though under the American criminal justice system a defendant is innocent until proven guilty, empirical and anecdotal evidence demonstrate that news of an investigation can harm a corporation.[297] Even without the adoption of the CDPA,

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295. FRIEDRICHS, *supra* note 5, at 48–49.

296. *See* Letter from Senators Glenn, Eagleton, Byrd, Hart, Melcher, Inouye, Sarbanes, Harkin, Kennedy, Cranston, Bingaman, Simon, Gore, Dodd, Rockefeller to Att'y Gen. Meese (May 7, 1985), *in* ISRAEL ET AL., *supra* note 78, at 74–75. The letter expressed "deep[] concern" that the $2 million criminal fine and $8 million set aside for restitution in the guilty plea to a massive bank fraud scheme by E.F. Hutton & Company would not "'send a clear signal' that 'white-collar crime will not be tolerated,'" given that there were no individual prosecutions and that the scheme involved from between $4 billion and $10 billion). *Id.*; *see also id.* at 75–77 (citing excerpts from Stephen S. Trott, Assistant Att'y Gen., Criminal Div., Prepared Testimony before the Subcomm. on Crime, Comm. on the Judiciary, H.R. (June 5, 1985)) (explaining that the prosecutors had to choose between the uncertain outcome of prosecuting two mid-level individuals or a comprehensive settlement that "would address most directly the serious problem of widespread money management abuses" and noting that the $2 million fine was the statutory maximum and "the steepest fine in the history of our white collar enforcement effort").

297. *See* Baucus & Baucus, *supra* note 21; *see, e.g.*, Smith, *supra* note 287, at 1B (reporting an outflow of investor funds "under the cloud of possible legal charges by state and federal regulators . . . . and many institutional clients [of Strong Capital Management] say they are reassessing their relationships with the company"). News sources are replete with stories of stock declines touched off by news of government investigations into possible wrongdoing. *See, e.g.*, Bloomberg News, *Company News; NDCHealth Delays Results, Citing Accounting Inquiry*, N.Y. TIMES, Apr. 2, 2004, at C3 (reporting NDCHealth Corporation share price dropped 16% after announcing an investigation in "accounting issues" would delay release of third-quarter financial results); Bloomberg News, *Company News; Friedman's Shares Down as S.E.C. Widens Inquiry*, N.Y. TIMES, Nov. 13, 2003, at C4 (reporting Friedman's, a jewelry retailer, share price declined 39% after acknowledging that the SEC and the DOJ had expanded an inquiry into fraudulent financial statements); Bloomberg News, *Company News; Pre-Paid Legal Services Says Membership is*

the threat is present.[298] The question presented here is whether the threat is magnified by the existence of the CDPA to such a degree that it overshadows the CDPA's usefulness in deterring and combating organizational crime.

Because of the market reaction to the threat of criminal prosecution[299] and the collateral consequences of conviction,[300] critics charge that the government can extort cooperation by threatening criminal prosecution.[301] In addition to the market costs of involvement in a criminal investigation, the actual cost of defending such a case can be oppressive given that white-collar investigations and prosecutions tend to be long and protracted processes often involving thousands of documents.[302] On the other hand, the managers of the corporation may welcome

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Increasing, N.Y. TIMES, Feb. 20, 2003, at C3 (reporting share price dropped 25% on news that the company is under SEC investigation); Eric Dash, *S.E.C. Steps Up Inquiry on Krispy Kreme*, N.Y. TIMES, Oct. 9, 2004, at C3 (reporting that reported declines in earnings and SEC accounting investigation have caused share price to drop nearly 75% since August 2004); Constance L. Hays, *Martha Stewart Company Posts First Loss and Blames Inquiry*, N.Y. TIMES, Mar. 5, 2003, at C6 (reporting that the company attributed its first quarterly loss in the three years since it went public to the criminal investigation into Martha Stewart's sale of nearly 4000 shares of ImClone stock); Paul Monies, *Vigorous Turnaround Efforts Get Blame in Grocery Distributor Fleming's Fall*, THE DAILY OKLAHOMAN, Aug. 1, 2004, at 1A (including an SEC investigation into accounting practices leaving investors and employees "uneasy" as one of the significant events leading to the company's "implosion"); E. Scott Reckard, *Corinthian Shares Sink on Probe News*, L.A. TIMES, June 25, 2004, at C4 (reporting that for-profit career schools' share prices fell in response to fraud investigations; Corinthian shares fell 10% after a report on a fraud investigation by the U.S. Department of Education, and Career Education Corp. shares fell 25% on announcement of the SEC's formal investigation into accounting fraud); Monique Wise, *$1.5 Billion Charge for Citigroup*, CHI. SUN-TIMES, Dec. 24, 2002, at 43 (reporting that "concerns about regulatory investigations and litigation" contributed to Citigroup's largest annual decline in shares in a decade: 19% in 2002); Michael Baron, *Movers & Shakers: Kaiser Aluminum, Netflix, Twin Disc, More*, CBS MARKETWATCH (Oct. 15, 2004), http://www.cbsmarketwatch.com (reporting AIG shares fell "another 4 percent" on news that the New York Attorney General was investigating the company for fraud; MetLife shares dropped 6% after the company reported receiving a "new subpoena" from the New York Attorney General's office; National Financial Partners shares dropped 10% after it reported receiving "two further subpoenas" from the New York Attorney General); *Millennium Cell, Olympic Steel, More—Update 3*, 2004 AFX NEWS LIMITED, Oct. 15, 2004 (reporting Marsh & Mclennan share price down 19%, based upon news that the New York Attorney General's office was "investigating the company for fraud"; National Financial Partners shares down 27% upon receipt of two new subpoenas from the Attorney General's office, although CBS MarketWatch only reported a 10% decline; Nelnet shares fell 3% after it acknowledged the SEC requested information in connection with an investigation).

298. *See supra* note 100 (discussing use of global settlements to resolve liability); *supra* notes 107–11 (discussing use of deferred prosecution agreements).

299. *See supra* notes 287, 297.

300. *See, e.g.*, BRICKEY, CORPORATE AND WHITE COLLAR CRIME, *supra* note 68, at 920–27 (describing the collateral consequences of the E.F. Hutton criminal case); *supra* note 82 (describing the collateral consequences in the Drexel Burnham Lambert case).

301. *See generally supra* note 270.

302. *See* ISRAEL ET AL., *supra* note 78, at 75 (quoting Stephen S. Trott, Assistant Att'y Gen., Criminal Div., Prepared Testimony before the Subcomm. on Crime, Comm. of

the opportunity to negotiate the criminal liability of the corporation in lieu of individual criminal liability.[303] In doing so, the corporation will suffer harm in criminal fines, restitution, and market reaction, while the individuals will often be held blameless. Moreover, because of the market implications of the criminal conviction of a corporation, the corporate managers through cooperation may even be able to negotiate a civil settlement that avoids criminal liability.[304] Because of the high burden of proof in a criminal case, the prosecution has an incentive to proceed with a civil settlement where the burden of proof is lower and the likelihood of success in litigation is greater.[305]

There is little doubt that the CDPA adds more firepower to the arsenal of prosecutors. Yet, successful lobbying by powerful corporations and trade alliances for "civil justice reform" have narrowed redress against corporate wrongdoing.[306] In this global environment, large corporations have gained power wielding their ability to move to friendlier locales.[307] The mere threat of a prosecutor seeking the "death penalty" is likely to cause share price to fall in response to sales by cautious and uncertain investors.[308] Nevertheless, permitting a culture of wrongdoing to fester can likewise cast a pall over the company.[309] Thus, costs must be balanced against benefits, including the benefit of deterring organizational crimes.[310] Indeed, public policy should discourage investment in ventures with a high-risk of criminal misconduct. The CDPA serves not just deterrent and retributive goals but operates to actually enhance capital flows to law abiding entities and away from scofflaw entities to the precise extent that investors lose confidence in entities that have been assessed strikes.

It is also true that aggressive competitors may use strikes to their advantage.[311] Because competition always exists, corporations can avoid enhanced risk of harm from a first strike by avoiding criminality sufficient to earn a first strike. In the end, lawfulness should be a competitive advantage; companies with strikes should not be relegated to oblivion but should have to pay for criminality.

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the Judiciary, H.R. (June 5, 1985), stating that the three-year investigation of E.F. Hutton and Company involved the analysis of 7,000,000 documents).

303. *See* Khanna, *supra* note 74, at 31–32 (suggesting that corporate managers may actually prefer lobbying for stronger criminal legislation, even if it puts the corporation at greater risk, because liability can be deflected from the managers to the corporation, the entity that is better able to bear the risk, and because the mens rea requirement is higher).

304. *See* Walsh & Pyrich, *supra* note 270, at 634–36.

305. *See* Khanna, *supra* note 74.

306. *See supra* note 185.

307. *See supra* note 192.

308. Even with respect to issues that seem remote to the business environment, "[t]he market hates uncertainty." Lawrence Carrel, *Election Deadlock Spurs Market Decline*, SMARTMONEY.COM (Nov. 8, 2000), *available at* http://www.smartmoney.com/bn/ndex.cfm?story=20001108052523.

309. *See, e.g.*, BRICKEY, CORPORATE AND WHITE COLLAR CRIME, *supra* note 68, at 920–27 (describing the collateral consequences of the E.F. Hutton criminal case); *supra* note 81.

310. *See supra* notes 294, 295 and text accompanying notes.

311. *See supra* notes 202–05.

Finally, disgruntled employees could view the CDPA as a personal weapon to undermine the organization and wield this weapon by working with prosecutors to secure a strike. The CDPA addresses significant corporate wrongdoing either in terms of dollars lost or gained, or in terms of harm caused;[312] the crime should be organizational in nature[313] and usually involve the conduct of multiple employees. Where individual misconduct can be identified as the source of wrongdoing, then individual criminal liability should be sought.[314] Therefore, the disgruntled employee should not be able to manufacture criminal conduct significant enough to bring down the corporation. Moreover, to the extent an employee affirmatively becomes a watchdog for corporate misconduct, that reaction falls within the CDPA's deterrence goal.

3. Discouraging the Good Corporate Citizen

The weapons against white-collar crime include imposing regulations promoting transparency in financial transactions and reporting,[315] encouraging good corporate citizenship through compliance programs,[316] placing gatekeeper[317] obligations on counsel,[318] and offering criminal actors leniency to encourage disclosure of criminal conduct.[319] Like these efforts, the CDPA should deter misconduct and encourage ethical corporate conduct; however, might it discourage cooperation from corporate leaders for fear of criminal sanction? Perhaps corporate leaders would prefer to risk going down looking[320] than to swing at a

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312. *See supra* note 245 and text accompanying note (discussing ways to measure the size of the harm in assessing whether a strike should be imposed).

313. *See* CLINARD, CORPORATE ETHICS, *supra* note 212, at 10, 13–14 (defining organizational crime as actions proscribed by law that are committed on behalf of the organization to achieve corporate goals and solve corporate problems).

314. *See supra* note 214 and accompanying text.

315. *See* 15 U.S.C. §§ 7211–7219 (Supp. 2002) (Public Company Accounting Oversight Board); *id.* §§ 7231–7234 (auditor independence); SEC Proposed Rule 22c-1, 66 Fed. Reg. 70,387 (proposed Dec. 17, 2003) (to be codified if adopted at 17 C.F.R. § 270.22c-1) (proposed rule to prevent mutual fund late-trading abuses), *available at* http://www.sec.gov/rules/proposed/ic-26288.htm (last visited Mar. 18, 2004).

316. *See supra* text accompanying notes 138–42.

317. *See* Coffee, *Gatekeeper Failure*, *supra* note 132, at 308 (defining "gatekeepers" as "outside professionals who serve the board or investors," who have "significant reputational capital," such as accountants and securities analysts, and who "receive[] a far smaller benefit or payoff for [their] role[s] . . . than does the principal [of] the transaction that the gatekeeper facilitates").

318. *See id.*

319. *See* ANTITRUST DIVISION, DEP'T OF JUSTICE, *supra* note 247 (offering protection against prosecution for all officers, directors, and employees of a corporation who cooperate, but the offer is only available to the first qualifying company that comes forward and cooperates with federal antitrust prosecutors, particularly if there was no prior existing investigation).

320. Even in its present configuration, the good corporate citizen effort described as a "carrot and stick" approach has been suggested to offer no real guarantees of lenity, but instead may present very real risks of criminal sanctions to the corporation. *See* Joseph E. Murphy, *Beating Them With Carrots and Feeding Them Sticks*, at 295, *in* U.S.S.C. SYMPOSIUM, *supra* note 120.

wild pitch. That is, perhaps by reporting corporate wrongdoing, the actor risks that the prosecution will insist the corporation take a strike even if negotiating a civil settlement.

Arguably, a corporate culture steeped in criminality already discourages employees from coming forward.[321] Indeed, throughout American culture, those who betray their friends or colleagues are met with common disdain and are negatively branded as rats, snitches, tattletales, whistle-blowers, and informants for their lack of loyalty.[322] The CDPA may further discourage some employees from coming forward.[323] As discussed above, the risks in choosing to cooperate or develop a compliance program already exist without the CDPA.[324] The CDPA may discourage some cooperation, but it may also discourage criminality through the threat of dissolution. Additionally, the CDPA may encourage early reporting, at least within the organization, before matters get out of hand.[325] The text of the CDPA will endow trustees to retain managers with a proven capacity for encouraging lawful conduct, and managers who were not present at the time of the misconduct underlying the strike but who have taken affirmative action to remedy

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321. *See* CLINARD, CORPORATE ETHICS, *supra* note 212, at 125. In a study of Fortune 500 middle management executives, the question was asked: "[I]f an employee, including management personnel, did report a serious violation of regulations to the government—blowing the whistle—should that person be protected by law from dismissal?" The responses were summarized as follows:

> One out of four of the total sample of respondents was of the opinion that any employees who reported violations to the government would subsequently be put in an uncomfortable position regarding salaries and promotions, and that they might even be harassed. So difficult might it become for them that their positions might be endangered, and they should probably not continue to work for the corporation.

Id. at 24, 125. As discussed *supra* note 151, Congress included whistle-blower protection in the Sarbanes-Oxley Act of 2002.

322. Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 2, 26–31 (2003) (recognizing that cooperators in criminal investigations are at least alienated from their confederates and may be even further ostracized for their perceived lack of loyalty; therefore, they face a level of retribution and punishment that is not experienced by other convicted criminals). "By whatever name he is known, the person who betrays his associates to the authorities is almost universally reviled. In movies, on television, in literature, the cooperator embodies all that society holds in contempt: he is disloyal, deceitful, greedy, selfish, and weak." *Id.* at 2.

323. *See* CLINARD, CORPORATE ETHICS, *supra* note 212, at 23, 114 (concluding in a study of Fortune 500 middle management executives that "[c]orporate employees, particularly middle management, will not, because of corporate loyalties, report serious corporate violations to the government, even though they had been reported to the highest corporate level," unless such violations present serious, unsafe working conditions). The study noted a sharp distinction in responses based upon whether the violation posed a risk of monetary loss versus physical injury. *Id.* at 114–15.

324. *See supra* note 270.

325. *See* U.S.S.G. § 8B2.1(5)(c) (including nonretaliatory internal reporting systems as one of the criteria for an effective compliance program under the Sentencing Guidelines); *supra* note 143 (describing corporate governance positions to promote ethical conduct).

past criminal conduct.[326] On balance, this should facilitate, instead of impede, disclosures of questionable conduct as managers seek the shelter of appropriate behavior and seek to avoid the fastening of a strike on their watch.

4. Imposing Governmental Controls on Business Management

Whether the corporation is dissolved or the management team and board of directors are replaced, once a trustee is appointed, government will (at least temporarily) enter the business of running a business.[327] Certainly, in a reorganization, the trustee's first order of business will be working with shareholders and creditors to appoint replacement board members and management.[328] The government already performs this very function to a greater extent in the context of bankruptcy.[329] On a more limited basis, the Organizational Sentencing Guidelines' probation policies suggest that such governmental intrusion can be effective if corporate management commits to the program.[330] Nevertheless, the lack of internal expertise by the trustee may impose some short-term costs on the corporation while reorganization is underway.[331] Finally, the appointment of a trustee will incur obvious costs, much like the direct and indirect costs in appointing a bankruptcy trustee.[332] Taken together with the costs of government divestment of corporate control, these costs must be balanced against the costs imposed upon society by repeated corporate criminality.[333]

5. The Slippery Slope of Vicarious Liability for Officers and Directors

Removal of directors and executive officers along with any other identifiably responsible managers does not extend vicarious liability for officers and directors,[334] even though the proposal would remove both those officers and

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326. *See supra* text accompanying notes 270–71.

327. *See supra* notes 206, 207, 209.

328. *See supra* note 210 (discussing the use of equity securities' and creditors' committees to aid the trustee in the appointment of a board of directors).

329. *See supra* notes 257–58 and accompanying text.

330. *See* Trevino et al., *supra* note 174 (addressing effectiveness of corporate compliance programs).

331. *See, e.g.*, 7 COLLIER, *supra* note 206, ¶ 702.02 (recognizing that a trustee may require specific knowledge of a business for the purpose of maximizing the value of the corporation). Under U.S. bankruptcy laws, a trustee with expertise may be elected. *See supra* note 206. *But see* Parker, *Optimal Penalties*, *supra* note 12, at 572 (arguing against nonmonetary penalties, such as corporate probation, because such governmental intervention creates "a system of regulation without specific legislative mandate, administrative expertise, or clear jurisdictional boundaries, and . . . employ[s] an approach of government standard-setting that is likely to be inappropriate and ineffectual in dealing with the problem of organizational crime").

332. *See* 7 COLLIER, *supra* note 206, ¶ 1104.02[3][d][ii] (recognizing some of the apparent costs associated with the appointment of a trustee include the cost of the trustee and the cost of professional persons retained by the trustee (most notably, legal counsel) in addition to the intangible costs associated with delay and "the 'education' of the trustee, who must learn about the business and the various constituencies in a case before the trustee can address adequately the underlying issues").

333. *See also supra* text accompanying notes 294–95.

334. *See supra* note 271.

directors with direct responsibility for the wrongdoing as well as those officers and directors who failed to stem the wrongdoing—whether from willful ignorance or otherwise.[335] Removal does not confirm criminal or civil misconduct and would entail no criminal or civil penalty. Instead, stigma and incapacitation are the only direct sanctions; this means that the director or officer no longer has the ability to contribute to the criminal culture of the specific corporation found to have accumulated three strikes, and that the director or officer will have his professional experience marred by a "death penalty." The death penalty would drive a dagger into the director's or officer's resume. This is precisely the hope that the CDPA offers.[336] Thus, self-interest and personal career jeopardy could lead to something akin to a zero-tolerance view toward ethical or criminal misconduct.[337]

Foreign investor confidence in U.S. businesses is influenced by the perception of the integrity of U.S. financial markets. Thus, confidence in U.S. businesses can lower the cost of capital by reducing interest rates, which is beneficial to all U.S. investors. Recently, foreigners have been fleeing our equity

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335. "Willful ignorance" is broadly defined in U.S.S.G. Chapter 8 as follows: "An individual [is] 'willfully ignorant of the offense' if the individual did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred." U.S.S.G. § 8A1.2 cmt. n.3(j). Such broad language to define liability has been criticized as discouraging effective management without proof of a deterrence relationship between corporate wrongdoing and one's nonsuspicion of one's colleagues or subordinates. Parker, *Rules Without*, *supra* note 12, at 413–14.

336. *See* CLINARD, CORPORATE ETHICS, *supra* note 212, at 12–14; Mathews, *supra* note 196, at 126–27 (citing to numerous studies recognizing that "senior management plays an integral part in setting the legal or illegal tone of a corporation"). Clinard identifies organizational crime as a "distinct form of white collar crime," which occurs as a result of a group of persons all acting on behalf of a common interest in achieving the corporate goal of profit maximization. CLINARD, CORPORATE ETHICS, *supra* note 212, at 13–14. In Clinard's study, the leadership role of top management was the overwhelming top reason for a lowered ethical environment in Fortune 500 companies, with 92.2% of middle-management respondents taking the position that "top management [is very much responsible for setting] the ethical tone for compliance with government laws and regulations" while an additional 6.3% of the respondents felt top management bore some responsibility for the ethical tone of the corporation. *Id.* at 71. Three factors identified as underlying corporate criminal misconduct accounted for more than 76% of all reasons given by respondents: (1) Top Management (51.2%) due to unethical character (41.6%), personal ambition (7.2%), and poor supervision (2.4%); (2) Competition, Greed, Profits (14.4%); and (3) Type of Industry (11.2%). *Id.* at 55; *see also* Daboub, *supra* note 172, at 138, 150 (identifying the lack of leadership by top management as furthering corporate criminality); Diane Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377, 1389–93 (1982) (recognizing the role of top management in providing norms and rewarding ethical conduct of subordinates). *See generally* MARSHALL CLINARD & PETER YEAGER, CORPORATE CRIME (1980); BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983); LEONARD SILK & DAVID VOGEL, ETHICS AND PROFITS: THE CRISIS OF CONFIDENCE IN AMERICAN BUSINESS (1976); Steven Brenner & Earl A. Molander, *Is the Ethics of Business Changing?*, HARV. BUS. REV., Jan.–Feb. 1977, 57; Richard Pascale, *The Paradox of "Corporate Culture": Reconciling Ourselves to Socialization*, 27 CAL. MGMT. REV. 26–41 (1985).

337. *See* Weaver et al., *supra* note 124, at 547–49.

markets. Corporate corruption remains a high-profile issue in the United States with a series of trials of corporate officers.[338] The CDPA can serve to enhance investor confidence and lower the cost of capital in the United States in a sound and balanced fashion without imposing new risks and costs on our economy.

CONCLUSION

Our current system of deterring corporate misconduct is weak and ineffective. Management that tolerates, permits, and even fosters a criminal culture is largely beyond the reach of the law because managers cannot be personally convicted absent evidence beyond a reasonable doubt that they acted with mens rea. This has imposed costly externalities upon our economy in the form of excess crimes and has harmed investor confidence, leading to an unnecessarily high cost of capital. Management should finally be held responsible for failing to insist upon lawful conduct. The CDPA articulated herein can effectively accomplish this goal. Although a "corporate death penalty" may sound draconian, it is a modest step for dealing with management that may not directly violate laws but is willing to book profits from criminal conduct by turning a blind eye or worse. The CDPA as proposed here is structured to shield innocent shareholders and employees from costs associated with the sanction of dissolution. Its focus is simply on divorcing management that is demonstrably promiscuous regarding crime from the assets of the corporation. The business can be sold intact. The corporate assets can be sold wholesale. Or, management can merely be ousted and replaced. A trustee would decide how to proceed and would also be charged with protecting various stakeholders, even to the extent of excising from the sanction of the CDPA those innocent managers who tried to encourage compliance.

Although the CDPA would rarely be triggered, stakeholders must understand its potential to effectively restrain corporate misconduct in order to reap its benefits. Given corporate influence in the political process, one might question whether corporations would support politicians that pass the CDPA. Of course, this is precisely the point. If corporate dominance is such that laws cannot pass to stem that authority, then we are too late—the machine has already won. The use of government authority to finally restrain and deter criminal conduct is

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338. Dan Margolies, *$37 Million in Combined Salaries, Bonuses Now at Stake: Wittig, Lake Guilty*, KAN. CITY STAR, Sept. 13, 2005, at A1 (reporting federal jury convicted Westar Energy Inc. former Chairman and CEO David Wittig of thirty-nine counts, and former Chief Strategic Officer Douglas Lake of thirty counts on charges of looting the utility company); *Where Are They Now?*, USA TODAY, Sept. 20, 2005, at 5B (updating the progress on the criminal cases of several well-known corporate leaders: WorldCom former CEO Bernie Ebbers is appealing his July 13, 2005, sentence to twenty-five years imprisonment; Ken Lay and Jeff Skilling, former CEOs of Enron, are awaiting trial on fraud charges, set for January 2006; Richard Scrushy, former CEO of HealthSouth was acquitted of fraud charges on June 28, 2005; John Rigas, founder of Adelphia Communications is appealing his fifteen-year sentence handed down June 20, 2005; and Martha Stewart served five-months imprisonment and house arrest for lying to federal agents); Ben White, *Former Tyco Executives Sentenced to Prison*, WASH. POST, Sept. 23, 2005, at D1 (reporting former CEO Dennis Kozlowski and former CFO Mark Swartz were sentenced in New York state court to prison term of eight to twenty-five years and ordered to pay $240 million in fines).

crucial to achieve the good corporate citizen and restrain the soulless machine. The CDPA can be that final restraint.